Social Insurance and Tort Liability in Chinese Workers' Compensation System: Problems and Reform Suggestions

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Abstract:

For injury or death from accident or occupational disease suffered from work, there are principally two potential remedies of compensation: workers' compensation social insurance and civil liability. Among the most acute problems of workers' compensation system is the conflict between converging remedies of social insurance and tort liability. Therefore, the relationship between private tort liability litigation and public workers' compensation social insurance program in the way of compensating work-related injuries and diseases deserves great significance in the design of workers' compensation system throughout the world. Especially it has become an acute problem in the construction of China's workers' compensation system, since tremendous victims on the job every year struggle to seek ways of supplementing their inadequate workers' compensation awards in China.

This Mphil thesis offers a critical and yet constructive view of China's compensation system for work-related injuries and has taken a profound exploration of the relationship between tort liability litigation and workers' compensation social insurance program in China's system with doctrinal, structural and empirical perspectives. It first outlines the severity of the problems facing that system and then proposes some feasible ways to address those problems. For the purpose of addressing China's problems the workers' compensation systems at the international level are explored. The main part of the thesis offers a basic scenario of integrating social insurance compensation program and tort liability remedy into the whole workers' compensation system for dealing with industrial injuries in today's China. With the understanding of the basic structure of compensation system proposed in this regard, this thesis also has tried to conceive some further reform considerations stemming from the basic framework with respect to the concrete arrangements of two remedies according to the categorizations of work-related damages in China.

對於工作期間發生的事故或者職業疾病並由此導致的傷亡，原則上有兩種可能的救濟管道：工傷保險與民事賠償。社會保險救濟與侵權救濟在工傷賠償系統中由於相互交叉而產生的衝突已經成爲工傷賠償制度中最尖銳的問題之一。因此，如何建構工傷賠償制度從而理清私法上的侵權救濟與公法上的社會保險救濟之間的關係問題已經在全球範圍內引起廣泛的關注。這個問題在中國的工傷賠償系統中尤爲突出，每年數以百萬計的工傷受害者由於微薄的工傷賠償而苦苦掙扎和尋求其它受償的方式。在這樣的情況下，建立起中國的工傷賠償制度以合理的安排社會保險與侵權賠償兩種救濟方式儼然成爲亟待解決的問題。

本篇碩士論文旨在通過批判的眼光審視現行的中國工傷賠償制度，並在此基礎上提出建設性的方案。同時，從理論、結構以及實證方面對中國工傷賠償制度中侵權責任與社會保險兩者的關係進行深入的探討。本文將分析目前中國工傷賠償制度所面臨的嚴峻問題，通過總結國際經驗，提出相應的方案來解決這些問題。本文的重點將在提出一個可行的方案以將工傷保險和民事侵權兩種救濟方式有效的整合進中國工傷賠償制度中。本文不僅建構了如何安排兩種賠償的工傷賠償基本框架，而且提出了具體的改革建議以支持所提出方案的有效實施。

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CHAPTER 1 INTRODUCTION

I. INTRODUCTION

This Mphil thesis offers a critical and yet constructive view of China's compensation system for work-related injuries. It first outlines the severity of the problems facing that system and then proposes some feasible ways to address those problems. For the purpose of addressing China's problems the workers' compensation systems at the international level are explored. The main part of the thesis offers a view that combines social insurance compensation and tort liability for dealing with industrial injuries in today's China. In the following pages I try to provide a brief introduction to the whole paper so that the reader will have a clear overview of what my thesis is about.

A. The Meaning of "Work-Related Injury"

At the very outset, it is helpful to address the meaning of "work-related injury". Scholars of different legal systems have given "work-related injury" a variety of names; the most commonly used ones are 'workplace injury', 'industrial injury', 'occupational accident', 'occupational disease' and so on. These different names, in some instances, have reflected understandings of the work-related injury from different points of view. From the obvious industrial accidents to the inclusion of occupational diseases, and from cases arising in the course of employment to those arising out of the employment and even the road accidents from and to the work, people in modern industrialized society have been experiencing a process of deepening and progressive understanding of the work-related injury.

Officially, the first general definition of work-related injury can be found in the 1921 International Labor Organization Convention Act, which is "the accidents directly or indirectly arising out of work".[1] At present, a relatively detailed definition of industrial injury can be found in the statutes of most industrialized countries. In China, scholars still follow the term 'industrial injury' as before. The industrial injury in present China means the workplace injury that arises out of and in the course of work, including the death, permanent bodily or mental impairment which is unable to be restored completely, and the temporary physical or mental damage which is capable of rehabilitation, which generally is comprised of workplace accident and occupational disease.[2]

B. The Problem

Given that China is currently reaching its fifth peak period of industrial accidents, successfully addressing the relationship between workers' compensation social insurance and tort liability is of great importance to the development of a feasible workers' compensation system in China. Having experienced thousands of years of agricultural economy, China's development as an industrial country is still at its early stage. Stimulated by the reform and opening-up policies, China's industrialization had arrived much later than that in western countries. Negatively affected by the malformed industrial development at the early stage, China developed the double-track structured society, which resulted in the unbalanced expansion in industries and in different regions. Due to the prolonged unbalanced industrial composition of high technology industry and crude heavy industry, China is still facing the soaring number of industrial injuries every year. According to authoritative data, in China from 1985 to 1995,

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[1] C121, Employment Injury Benefits Convention, revised 1964.

[2] Zheng, Shangyuan. Research on Workers' Compensation Social Insurance Legal Institution. (Gong Shang Bao Xian Zhi Du Fa Lv Yan Jiu 工伤保险制度法律研究) Beijing: Peking University Press. 2004, p11.

there were two industrial accidents including over three deaths daily, and there was one accident including over ten deaths every three days.[3]

In the coal mine industry, for example, 2004 alone witnessed approximately 15,597 industrial accidents with 17,315 deaths. The numbers increased about 10.2% and 16% separately compared with those in 2003. The pace of super severely safety accidents in 2004 was not harnessed effectively, which is reflected in that the number of the severe safety accidents including over thirty deaths surpassed 3.6% over that of the former year.[4] Besides, there is still a substantial distance for China to catch up with developed countries, and even some underdeveloped countries, in the area of coal mine safety. In 2004, the death rate in China's coal mine sector was 3.08 per million tons, while the death rate of United States per million tons was 0.03, Poland 0.23, India 0.5, and Russia 0.7.[5]

Apart from that, there were a large number of workers plagued by occupational diseases. According to the statistics published by the Ministry of Health, the workers in over 16,000,000 enterprises were suffering from the threats of industrial diseases, and the hazardous factors such as dusts, toxicity and noises were torturing over 200,000,000 workers.[6] Until the end of 2003, the number of patients who have dust lungs had amounted to 581,377 with the average increase of 12,000 patients every year.[7]

All these numbers and statistics have revealed the severity of industrial

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[3] Tong Fung, Main Features of the Workers' Compensation Scheme in China, Struggle for Justice, Asia Monitor Resource Centre, p 61.

[4] Occupational Health and Safety Report in China – Labor Rights Lose Out to Government and Business (April, 2005), Chapter 1, China Labor Bulletin, http://www.clb.org.hk/schi/node/61879.

[5] Sun Shuhan, Development and Problems of Work-related Injury Insurance System in the People's Republic of China, Struggle for Justice, Asia Monitor Resource Centre, p 53.

[6] Occupational Health and Safety Report in China – Labor Rights Lose Out to Government and Business (April, 2005), Chapter 1, China Labor Bulletin, http://www.clb.org.hk/schi/node/61879.

[7] Occupational Health and Safety Report in China – Labor Rights Lose Out to Government and Business (April, 2005), Chapter 1, China Labor Bulletin, http://www.clb.org.hk/schi/node/61879.

injury that China has been confronted with. Correspondingly, to tremendous injured workers on-the-job in China, a fair workers' compensation system with effective work-related injury compensation, prevention and rehabilitation means everything. The adjustment of workers' compensation social insurance program and tort liability litigation is an inevitable issue in the exploration of the better functioning of workers' compensation system in China in the respects of regulating compensation, promoting prevention of work-related injuries and enhancing rehabilitation.

With regard to compensating the workers who suffer from work-related injury in China, two major remedies can be resorted to. One is the workers' compensation social insurance program within the framework of social security system, while the other is the tort liability litigation within the civil law system. On most occasions, when the injured workers start to claim for getting compensated, the primary problem they have to confront with is how to arrange two remedies for figuring out a plan which best suits their own situation of injury.

Inevitably, some overlaps or even conflicts exist in such public and private ways of compensation when it comes to the right of claim for compensating damages resulting from work-related injury. Consequently, here arises the important issue of dealing with the relationship between workers' compensation social insurance program and tort liability action within the broader workers' compensation system in China. And this issue is one of the principal problems in the improvement of Chinese workers' compensation system currently.

C. The Current Legal Framework and Its Problems in China

The workers' compensation insurance program in China was first established during the early years of the PRC with the promulgation of The Labor Insurance Regulations in 1951 and The Decision on Several Amendments

Regarding Labor Insurance Regulations in 1953. Owing to historical and political reasons, the workers' compensation system in China has experienced a regression from 1960s to 1970s. Until 1996, the former Ministry of Labor issued The Provisional Provisions on Workers' Compensation Insurance for Enterprise Employees (Labor Decree [1996] NO. 266, PPWCIEE), which led the work-related injury social insurance program to gradual improvement subsequently. To strengthen the legally binding effects, The Regulations on Workers' Compensation Insurance (RWCI) (State Council Decree No. 375) was promulgated in 2003 for bringing about a revolutionary breakthrough for China's work-related injury social insurance system. The RWCI, together with provincial regulations about operational details and amounts of compensation benefits drafted by provincial governments, forms a substantial legislative framework of workers' compensation social insurance program in China.

However, in the process of the establishment and development of Chinese workers' compensation legislation and Occupational Safety and Health laws, the relationship between social insurance and tort liability has not drawn adequate attention proportionate to the significance of this problem. The loopholes in legislation reflect in the following aspects:

a. PRC Social Insurance Law (Draft) Avoids the Problem

From December 2008 to February 2009, The PRC Social Insurance Law (Draft) issued by National People's Congress Standing Committee has completed its public consultation period. Approximately 70,000 suggestions were collected from every corner, among which a great deal focuses on the relationship between workers' compensation social insurance and tort liability, because the public was disappointed again owing to the avoidance of this problem in the draft. Instead of clarifying the relationship between social insurance and tort liability explicitly, the draft showed its implicit motivation of

avoiding this problem entirely by excluding "the motor vehicle accident from and to work" from the coverage of workers' compensation social insurance program which was previously covered by RWCI.[8] This change actually left the work-related injury caused by motor vehicle under the protection of the civil compensation system alone and thus was conceived as an irresponsible measure by most ordinary workers and scholars. In most scholars' points of view, the positive way of solving the conflicts between workers' compensation insurance and tort liability in compensating work-related injury should be working out a feasible plan instead of pretending ignoring such problem.

b. Current Effective and Authoritative Legislation on National Level Shows Inadequacy or even Blank

Currently, the most significant workers' compensation insurance legislation is The PRC Regulations on Workers' Compensation Insurance (State Council Decree No. 375). However, it does not provide any provisions regarding the relationship between social insurance and tort liability. On the civil legislation side, Article 12 of the Interpretation of The Supreme People's Court on Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury (Judicial Interpretation [2003] 20) tried to touch upon the issue but failed to provide a clear solution of dealing with the relationship between the two compensation remedies. Providing only some general guidance without operational details, Article 12 intrigued the disagreements of legal practitioners, scholars and policymakers based on different thoughts and constructions about the model of workers' compensation system.

Apart from the inadequacy of workers' compensation insurance legislation

[8] The PRC Social Insurance Law (Draft) has excluded Clause 6 of Article 14, PRC Regulations on Workers' Compensation Insurance from the coverage of workers' compensation social insurance program which provided, "he is injured in a motor vehicle accident while going to or returning from work".

and civil legislation, some OSH laws serve even weakened function with regard to solving the problem of coping with the relationship between the two remedies, such as The PRC Production Safety Law and The PRC Occupational Disease Prevention Law. The first reason lies in the limitation of binding effects owing to the specialized industry of OSH laws. Secondly, similar to Article 12, Article 48 of PRC PSL and Article 52 of PRC ODPL did not offer clear guidance of the operational details. Besides, it is alleged by most practitioners and scholars that certain substantial conflicts exist in the OSH laws and Article 12 of Judicial Interpretation [2003] 20.

c. Local Enforcement Regulations Appear in a Mess

Since the national legislation failed to lead a clear way of dealing with the relationship between workers' compensation social insurance program and tort liability litigation, the burdens subsequently fall on the shoulders of local provincial governments in China.

Due to the lack of clear provisions with detailed guidance in the current legislation of national level, local enforcement regulations show diversities of provisions with regard to this issue.

Some local policymakers tried to trace back to the old workers' compensation legislation for the solution of this problem. Article 28 of PPWCIEE[9] has provided a relatively clear way of adjusting the relationship between the two compensation channels. It appears that the tort liability compensation plays a dominant role, supplemented by the workers' compensation social insurance benefits when the injured workers have to choose between such options. Therefore, the same provision as Article 28 of PPWCIEE can be found in some of current local workers' compensation enforcement regulations in China, such as Article 20 of Yunnan Provincial Workers'

[9] Since the PRC RWCI was promulgated on January 1 2004, the PPWCIEE1996 was naturally abolished.

Compensation Enforcement Regulation, Article 27 of Zhejiang's regulation. Apart from those local areas which copied the entire Article 28 of PPWCIEE, some areas have enacted only general provisions without concrete instructions in their regulations, instead of copying the old ones, such as Hubei's[10] and Sichuan's[11] regulations.

Some other areas set some special provisions apart from following the model provided by Article 28. For example, Shanghai allows workers' compensation social insurance benefits to be prepaid to injured workers. Exceptionally,[12] few local areas like Shanxi endeavor to set concrete calculation standards in its enforcement regulation.[13]

Different from the model set by Article 28 of PPWCIEE, individual areas have tried to lead some new pattern of dealing with the relationship between workers' compensation social insurance and tort liability. For example, Xiamen's enforcement regulation does not restrict a compulsory sequence of the two compensation remedies.[14]

Still other areas choose to act negatively in solving the relationship between two channels. For example, Fujian and Chongqing have no provisions in their enforcement regulations regarding this problem. The absence of provisions in no way shows favor to the problem encountered by these local areas. This naturally results in the appearance of different outcomes of work-related injury cases dealt with by their labor administrations and civil courts.

The loopholes of the legislation concerning the relationship between workers' compensation social insurance and tort liability lead to a number of substantial problems in workers' compensation practice in China. The

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[10] See Article 39 of Hubei Provincial Enforcement Regulation of Workers' Compensation Insurance.
[11] See Article 10 of Sichuan provincial enforcement regulation.
[12] See Article 44 of Shanghai Enforcement Regulation of Workers' Compensation Insurance.
[13] See Article 23 of Shanxi's enforcement regulation.
[14] See Article 37 of Xiamen's enforcement regulation.

malfunctioning of Chinese workers' compensation system derives from the inadequacy of the legislation reflects in all aspects of compensation, prevention and rehabilitation.

d. Compensation Problem: Unfair Treatment

With the varieties of provisions and constructions of the national and local workers' compensation legislation, the model of dealing with the relationship between workers' compensation social insurance and tort liability action has never been unified. This non-unification leads to diversities of compensation results. It mainly reflects in the disparity of amounts of compensation benefits awarding to victims in different work-related injury cases. The unfair compensation results vary in accordance with different types of work-related injuries as follows:

i. Workplace Injury Caused by Motor Vehicle vs. Other Workplace Injury Caused by Third Party

According to some provisions provided by certain local judiciaries or governments, the injured workers who suffer from motor vehicle accidents relating to work are not entitled to recover from workers' compensation social insurance benefits after getting compensated from tort liability litigation. For example, the injured workers are deprived of the entitlement of social insurance awards in terms of Article 12[15] of The Beijing High People's Court Suggestions of Some Issues Concerning Trial of Workplace Injury Administrative Cases (Beijing High [2007] 112); however, as to the work-related injuries caused by the third party other than motor vehicle, the compensation results appear to be

[15] Article 12 of the Beijing High People's Court Suggestions of Some Issues Concerning Trial of Workplace Injury Administrative Cases (Beijing High [2007] 112)," with regard to the workplace injury caused by motor vehicle accidents, it should comply with the PRC Road Traffic Safety Law and other laws and regulations for tort compensation at first. If the medical expenses, care of living expenses, expenses for instrument of disability, capacity of earning and funeral expenses have been included in the tort compensation, the social insurance administration will not provide such benefits."

distinct.

ii. Similar Work-related Injury Cases Get Different Results according to Different Local Regulations

The diversities of models adopted by different local workers' compensation enforcement regulations has led to the fact that injured workers who suffer from similar work-related injuries obtain greatly different amounts of compensation benefits. What should be noted is that such disparity of benefits in no way accounts on different economic development levels of local areas in China.

iii. Work-related Injury involving Negligent Employer vs. Work-related Injury Caused by Third Party

According to current common construction of Article 12 of the Judicial Interpretation [2003] 20 applied in workers' compensation practice in China, the injured workers who are covered by Chinese workers' compensation social insurance program cannot file tort liability litigation against their employers who contribute to the injuries negligently. However, Article 12 supports injured workers' rights to recover from the third party instead. Such unfair protection by legislation has given rise to intensive dissatisfaction among injured workers and has been criticized by many scholars in China.

e. Prevention Problem: Lack of Incentives to Prevent Industrial Accidents

Given the extraordinarily high rate of workplace accidents in China these years, it is fair to say that the workers' compensation system is serving a disappointing function in promoting prevention of industrial accidents. The inappropriate relationship between workers' compensation social insurance program and tort liability suit might have contributed to this malfunction to some extent. The prohibition of tort liability actions according to Article 12 of the Judicial Interpretation [2003]20 has potentially undermined Chinese

employers' incentives of preventing workplace accidents, thereby raising the hazards of workers' working conditions. The relief of prevention consciousness of the irresponsible employers results in their various behaviors which might lead to workers' injuries. For example, many employers overlook the importance of safe working environment, in highly risky industries. This reflects in depriving their workers of necessary training or hiding the facts of touching toxic materials or refusing to provide protection instruments.

Especially when the workers' compensation social insurance program and OSH laws are playing relatively minor roles due to the enforcement difficulties, the deterrence and punishment function of tort liability litigation in workers' compensation system should be conceived as a powerful instrument in the prevention of work-related injuries in China.

Besides, the lack of a feasible model of adjusting the relationship between workers' compensation social insurance and tort liability continues to indulge those irresponsible employers who tend to escape from the social insurance contributions. This has led to the fact that lower coverage of workers' compensation social insurance program was applied to the workers who perform highly risky industries.

f. Rehabilitation Problem: Low Benefit of Workers' Compensation Insurance

One of the major goals of workers' compensation system is the capability of aiding injured workers to recover back to work. This requires the benefit of workers' compensation social insurance program should reach certain level. However, the prohibition of tort liability action against negligent employers has excluded a substantial resource in the way of recourse right of workers' compensation social insurance funding, thus indirectly slowing down the pace of the improvement of the social insurance benefit. Since the benefit level is far

from enough to meet the basic living needs of the injured workers, let alone rehabilitating the injured in China.

D. Referential Points

When an international perspective is adopted, one can find that devising a feasible model of workers' compensation system concerning the relationship between workers' compensation social insurance program and tort liability litigation has been conceived as a historical mission for centuries by many western countries which experienced industrialization much earlier than China.

Tort liability system, as the original and once the only remedy for compensating workers suffering from work for centuries, has existed long before the emergence of workers' compensation social insurance program. Before the middle of the nineteenth century, however, the traditional essence - the fault principle -of tort liability system was stacked against the injured workers. It appeared to be the contributory negligence, the assumption of risk and the fellow-servant rule which were sometimes called "the unholy trinity" of defenses.

Given an extraordinarily high level of industrial accidents brought by the industrialization from the end of the twentieth century, industrial injury had become a social problem which exacerbated the tension between workers and employers. This tension mainly driven by the fault principle put the tort liability system under the pressure of refinement in the way of compensating injured workers. Some common law countries such as England endeavored to make gradual modifications for keeping the workers' compensation within the scope of tort system. Yet it was proven that such modifications failed to reverse injured workers' situation without changing the essential fault principle in tort liability system.

When the common law scholars and policymakers were wondering and thinking about the ways to refine tort liability system for keeping workers' compensation separate from tort system, some continental law countries had begun to explore other ways to resolve work-related injury problems apart from tort liability system. Undoubtedly, Germany was the pioneer for the first establishment of the no-fault workers' compensation social insurance program. The no-fault social insurance program which was followed by many other countries represents a radical departure from the traditional tort liability remedy.[16]

The industrialization and the exploration of better compensation for the work-related injury and disease provided the social and philosophical basis for social security in modern countries. The trend of integrating workers' compensation social insurance program into social security system was thus spread throughout the world.

The shift of conceptual foundation of workers' compensation from traditional tort liability system to social insurance system is considered revolutionary by many tort law and social insurance law scholars. Workers' compensation social insurance program was originally designed, thus conceived as an exclusive remedy for compensating work-related injury and disease, precluding litigation in tort liability system. Since the tort remedy has been marginalized for decades, people today tend to think of workers' compensation system for workplace injury even with the absence of tort liability system. However, workers' compensation, which is the most fundamental tort reform, may be incapable of escaping from tort liability system entirely.

The justified reasons for the importance of tort remedy in workers' compensation system can be attributed to that the difficult problems workers'

[16] In 1880s, Germany first established its first no-fault workers' compensation social insurance program, and in the ensuing years, this model of workers' compensation was followed by many other European countries such as France, Belgium, Italy, as well as United States, and many Asian countries including China. For more details, see Chapter 2 of this thesis.

compensation social insurance programs of many countries have been and are facing seem to make it hard to accomplish the goal of replacing tort liability litigation entirely until today. A major consequence of the decades-long tension between controlling costs and providing adequate benefit levels has been for workers to seek ways of supplementing their workers' compensation awards.[17] Another explanation for this might be the fault principle, which dominates the tort liability system today. Until today, the tort liability action based on fault principle still functions as a significant remedy apart from no-fault workers' compensation social insurance programs for work-related injury in quite a number of countries including China. There is still a tremendously large room for tort liability remedy to function, especially under the circumstances where the no-fault workers' compensation social insurance program shows inadequacy in the work-related injuries caused by negligent employers or the third party. Besides, the emergence of private liability insurance and its combination with tort liability has increased the possibility of injured workers' access to the tort liability remedy. For the reasons above, the interactional relationship between the workers' compensation social insurance program and the tort liability system makes the idea of absolutely excluding the tort remedy from workers' compensation system for work-related injury seem irrational and unlikely.

Given a very brief historical background and observations of the inter-relationship between tort liability system and workers' compensation social insurance program, it can be concluded that exploring a feasible relationship between two remedies within workers' compensation system has been and is still a significant problem that most industrial countries are working on. Relatively uniformed rules of the application of tort liability remedy besides the no-fault workers' compensation social insurance program need to be clarified. Such rules are by no means likely to be ignored in the improvement of workers' compensation systems of most countries throughout the world. Therefore,

[17] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p66.

envisaging a relationship between tort liability litigation and workers' compensation social insurance program to operate harmoniously within the broad workers' compensation system is the common goal of modern industrialized countries.

Professor John Fleming [18] proposed four models of adjusting the relationship between the two compensation regimes, in 1975, as the Cumulating Model, Electing Model, Supplementing Model and Relieving Model.[19] The Cumulating Model, also called "double recovery", means that the injured worker is able to keep both accesses to the social insurance benefits of workers' compensation program and tort compensation from civil liability litigation. The Electing Model forces workers to elect between social insurance awards and tort recovery. The Supplementing Model permits the co-existence of both compensation remedies, though not in excess of full indemnity for the worker's injury. The Relieving Model rests on the partial immunity of tort liability action against certain tortfeasor or under certain circumstance when the compensation for work-related injury is needed.

For over thirty years, since the original Model Theory was proposed, some changes in the way of adjusting tort liability and social insurance have taken place which by no means should be ignored. Some significant changes reflected in the corresponding changes of the adoption of workers' compensation models in a number of countries and even gave rise to a brand new model. Based on the observations, some trends and the justifications lying under such trends need to be perceived.

Having been excluded or marginalized from the center of this acute problem for centuries owing to China's under-development, contemporary China

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[18] John Fleming, Professor of University of Berkley, Law School. He is an honored scholar in tort law of common law jurisdictions. He first proposed his Model Theory of workmen's compenstion in his writing of "Tort Liability for Work Injury", Chapter 9, vol. XV, International Encyclopedia of Comparative Law.

[19] The following description of the Model Theory proposed by John Fleming refers to "Tort Liability for Work Injury", p25-31, Chapter 9, vol. XV, International Encyclopedia of Comparative Law.

ought to keep a close eye on the trends of the workers' compensation models adopted by other countries throughout the world concerning the relationship between tort liability and social insurance. Figuring out the advantages and disadvantages underlying the experiences of other industrialized countries is considered an efficient way of having a decent grasp of this issue to fill the gap between China and the world. And only by taking the unique situations of Chinese workers' compensation system into consideration, will it be possible to envisage a feasible scenario of balancing workers' compensation social insurance and tort liability litigation within workers' compensation system for China.

II. CURRENT SCHOLARSHIP ON THIS ISSUE

In the context of exploring the inter-relationship between tort liability and workers' compensation social insurance program within workers' compensation system in China, it is very useful to briefly review important research works currently available, on which this paper has been based. Most of the research has been conducted by Chinese scholars, among which a few books and articles have been published especially on the improvement of the workers' compensation system in China. Apart from that, several articles and books written by western scholars concerning this issue which have contributed substantially to the arguments of this paper will also be addressed briefly.

A. Important Chinese Works

Among the most acute problems of workers' compensation system in China, the issue of adjusting the relationship between tort liability and social insurance program has recently entered the spotlight of scholars' attention. Most of the

scholar works concerning the relationship between two compensation regimes in workers' compensation system in China endeavored to focus on the doctrinal research based on John Fleming's Model Theory in 1970s.

Professor Zhang, Xinbao, for example, in his paper of "The Relation between Rights to Claim Labor Injury Insurance and Right to Claim Common Personal Damage", has made some brave recommendation of envisaging workers' compensation system model in China. He suggests that the combination of the Relieving Model under the circumstance of non-third party caused work-related injury and the Electing Model in the condition of workplace injury derived from third party tort behavior might be a better choice for workers' compensation system in China currently. Professor Zhang points out that the principle of justice and efficiency, as well as 'the positive right theory', provides justification for the privilege of workers' compensation social insurance program within compensation system for industrial injury, but he overlooks the underpinning reasons of his favor of the Electing Model. A large portion of his paper in discussing Fleming's Model Theory and introduction of two compensation remedies in China focuses on the theoretical phase, despite his own commitment to the critical discussion of some current legislation about workers' compensation system.[20]

However, Lv, Lin, in the last chapter of her book about research on legal issues relating to workers' compensation social insurance, has obviously provided suggestions for devising workers' compensation system structure which is different from Professor Zhang's recommendation. She argues that the choice of workers' compensation system model concerning adjustment of the two compensation regimes should be based mostly on the consideration of Chinese social policy, not simply in favor of the minority's right. She suggests that it is better for Chinese workers' compensation system to adopt the

[20] Zhang Xinbao, The Relation between Rights to Claim Labor Injury Insurance and Right to Claim Common Personal Damage (工伤保险赔偿请求权与普通人身损害赔偿请求权的关系), [2007] Chinese Legal Science, pp. 52-66.

Supplementing Model and provides very briefly the theoretical justifications for adopting such a model. She first notes that the Supplementing Model agrees with the original purpose of envisaging workers' compensation. She continues by generally discussing the full compensation and deterrence function with the adoption of the Supplementing Model. In addition, she offers, in a nutshell, a perspective of allocating social resources in considering the workers' compensation model in China.[21]

Rui, Lixin is more critical towards the workers' compensation social insurance program. Accordingly, he believes that in the workers' compensation system of China, the tort liability system should be the principal remedy in compensating work-related injury, supplemented by workers' compensation social insurance program. Apart from that, the injured worker should be entitled the right to choose either tort compensation or social insurance award after the injury occurs. Once the tort liability compensation is paid, the social insurance compensation will not be available, or vice versa. Almost no empirical evidence can be found evidently to convince that the tort liability system should play the dominant role in workers' compensation system in China, despite some theoretical comparison between tort liability claim and social insurance in his paper such as the differences on responsibility carrier, basis of claim, people covered, compensation principle and the method of payment.[22]

Professor Wang, Zejian, in his paper "Compensation for Work-related Injury and Tort Liability Compensation", has provided a structural framework of the research on the relationship between tort liability and workers' compensation social insurance by discussing the similar issue in Taiwan. By simply referring to Fleming's Model Theory, Professor Wang has been down to the ground of the problem of workers' compensation system in Taiwan through case study. His

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[21] Lv Lin, Research on Legal Issues Relating to Workers' Compensation System (Lao gong sun hai pei chang fa lü zhi du yan jiu 劳工损害赔偿制度法律问题研究), Chapter 7, pp. 266-267.

[22] Rui Lixin, Research on Several Legal Problems of Workers' Compensation Social Insurance, The reform of social insurance in China and the development of legal systems(社会保险改革与法制发展), pp. 141-183.

paper has reminded us that the empirical side or practical phase of workers' compensation system in China may be a more valuable field to explore in the process or devising the workers' compensation model concerning the relationship between tort liability litigation and social insurance program, because it complies with the pivotal purpose of adjusting the two compensation remedies. Disappointingly, few Chinese scholars have ever engaged in empirical studies of the work-related compensation system in China before.[23]

B. Significant Works in Western Academia

Abundant academic works in the fields of both tort liability system and workers' compensation system have been published since centuries ago. Given that the tort liability of employers has made immense strides from the conditions prevailing in the nineteenth century which precipitated the emergence of workers' compensation, some of the books and articles have more or less been concerned with the relationship between tort liability and social insurance in the system of compensating workplace injury.

Among those representative works is John Fleming's "Tort Liability for Work Injury". Arguing from a tort scholar's point of view, Fleming has noticed the acute problem of the collision between converging regimes of social insurance compensation and tort liability action. As mentioned above, in his paper, Fleming summarizes four types of workers' compensation models[24] in adjusting two compensation remedies which provides significant theoretical foundation for systematical study on the relationship between tort liability litigation and workers' compensation social insurance program. In addition, Fleming makes efforts in perceiving some trends of the interaction of two

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[23] Wang Zejian, Lao zai bu chang yu qin quan xing wei sun hai pei chang,Compensation for Work-related Injury and Tort Liability Compensation, (劳灾补偿与侵权行为损害赔偿), School and Case Study of Civil Law, pp. 253-281.

[24] The four models are the Cumulating Model, Relieving Model, Electing Model and Supplementing Model.

compensation remedies within the workers' compensation system in the time of 1970s by arguing that 'increasing support is now gathering for the view that workmen's compensation is as well qualified to absorb the accident cost, or part of it, as the tortfeasor'[25].

As outstanding as Fleming's work is the report of "The Impact of Social Security Law on Tort Law" , which is an outcome of the second research project of the European Centre for Tort and Insurance Law. Workplace injury, as one type of major personal injuries, has been included in the report regarding the compensation system with the arrangement of public and private compensation remedies. The report is based on a questionnaire and comprises specific comparative reports of eleven countries of EU countries.[26] Through giving an overview of the current situation in these EU countries relating to the compensation for personal injury including work-related injury, the report has revealed some detailed interrelationship between tort liability law and social security law. The valuable picture provided by the report makes it possible to identify some ongoing trends of the interaction between tort liability and workers' compensation social insurance program within the system of workers' compensation in some EU countries.[27]

Another international perspective to deal with the relationship between tort liability and social insurance is offered by Kenneth Abraham in the United States. In the second chapter of his book, the author concludes that the workers' compensation which is 'the first tort reform, has been unable to escape tort entirely'.[28] Although few substantial suggestions are proposed on the model of workers' compensation system, his taking the private insurance system into the

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[25] John, G. Fleming, Tort Liability for Work Injury, International Encyclopedia of Comparative Law, Vol. XV, Labor Law, Chapter 9, pp.32.

[26] It must be noted that Switzerland is also included in the eleven countries due to its preparation of a fundamental reform of its tort law- to some extent also of its social security law- and therefore is worthy of special attention.

[27] Ulrich Magnus (ed.), The Impact of Social Security Law on Tort Law, Tort and Insurance Law, Vol. 3, Springer Wien New York.

[28] K. S. Abraham, The Liability Century: Insurance and Tort Law From the Progressive Era to 9/11, Harvard University Press, pp. 68.

comprehensive relationship of workers' compensation and tort has widened the horizon of the problem substantially.[29]

III. OBJECTIVE AND CONTRIBUTION

The principal objective of this paper is to devise a relatively feasible scenario of dealing with the relationship between workers' compensation social insurance program and tort liability litigation system in the compensation system for work-related injury in China. To solve the most representative cases and problems deriving from the current practices of Chinese workers' compensation concerning this issue, not only the basic structure of workers' compensation system will be recommended, but also the paper will come up with the concrete reform considerations of the system.

Only with the uniformity of a feasible workers' compensation model in China, can the goals of workers' compensation be met as follows:

a) Protect injured workers including compensating their actual losses and help them to rehabilitate to work in the future

b) Prevent accidents and relieve the damage or risk as much as possible

c) Punish the tortfeasor to meet the corrective justice

d) Spread the financial burden of tortfeasor appropriately to meet the distributive justice

A. Devising Scenario based on Empirical Evidence

As stated in the section above of current Chinese scholar works, very little

[29] K. S. Abraham, The Liability Century: Insurance and Tort Law From the Progressive Era to 9/11, Harvard University Press, 2008.

empirical research work can be found in China concerning the relationship between workers' compensation social insurance program and tort liability system, since most of the current scholars prefer to making suggestions simply based on doctrinal research. The reason for this might be traced back to the unavailability and inadequacy of empirical data that makes it difficult to find materials in this regard in China. However, the empirical perspective should be indispensable and of great significance to the recommended scenario constructed for workers' compensation system because the lack of empirical evidence will weaken its feasibility and practical value. Only by taking the unique situation of current Chinese workers' compensation system into consideration will the scenario of the adjustment of the relationship between the two compensation systems be well-suited for China in the future. And the best way of describing Chinese unique situation is to provide practical materials or empirical data.

In this paper, by referring to the recent empirical evidence and data, the arguments become more firm and evidence-supportive. The suggestion of the basic structure of workers' compensation system in arranging the relationship between social insurance program and tort liability litigation will not be extrapolated from the theoretical model recommendation which simply relies on Fleming's Model Theory in most of the existing works by Chinese scholar .

Apart from that, given the general structure in adjusting the two remedies in workers' compensation system, some concrete reform considerations for current compensation system for industrial injury have also been proposed. Such operational details concerning the system arrangements of workers' compensation system in China are difficult to be found in the related scholars' works due to their lack of grounding perspective.

B. Capacity to Solve Practical Problems through Case Study

While the empirical data or evidence is an indispensable element to the

adjustment scenario of social insurance program and tort liability litigation in workers' compensation system, the most efficient way to measure the feasibility or practical value of such scenario should be whether it is able to solve current problems lying in the workers' compensation practice in China.

In this paper, different from the Chinese works concerning this problem before, the case study, which few scholars with this concern have ever paid much attention to, plays a pivotal role because the original purpose of envisaging a uniformed rule of arranging workers' compensation social insurance program and tort liability litigation system in workers' compensation system is to solve practical problems that China is confronting with right now. Illustrated by some of the most representative and famous cases of different types of work-related injury in China, the most acute problems relating to the increasing tension of both compensation systems have been revealed entirely. Correspondingly, in the final chapter of the paper, the cases have been mentioned again in a relatively brief manner for verifying the capacity of problem solving of the scenario proposed by the author.

C. Update the Model Theory by Extending Horizon to Chinese Case

Unlike most of the scholarly works which rely heavily on John Fleming's Model Theory, this paper has paid more attention to the fundamental changes in the way of dealing with the relationship between social insurance and tort liability in a number of developed countries which took place in the last thirty years since 1970s when the Model Theory was first proposed. Undoubtedly, to some extent, the experiences of developed countries in the way of coping with this problem are valuable to workers' compensation system in China.

To the author, it obviously makes more sense to perceive the recent trends of adopting the workers' compensation models than limiting within the original Model Theory in 1970s. The observation and discussion of the changes are not

meant to be complete and accurate, but it does not impede the perception of the ongoing interaction between social insurance program and tort liability within workers' compensation system in other countries throughout the world.

By considering the unique problems lying in workers' compensation system in China, although the final scenario for China might by no means be perfect, nor would it be completely independent of the Model Theory and its developing trends, it is highly positive toward its well-suitability for current situation of China. Therefore, this paper, with the goal of exploring the feasible scenario of workers' compensation system in dealing with the relationship between social insurance program and tort liability litigation in China, contributes to updating the Model Theory by extending its horizon to the workers' compensation system in one of the currently most important developing countries—China.

IV. METHODOLOGY

As regards the methodology of this paper, the empirical approach and the structural analysis method play the most important role, supplemented by historical method and doctrinal method.

A. Structural Analysis

The structural analysis method is mainly employed in the analysis of current workers' compensation system in China in Chapter 3 of this paper. To treat the current Chinese system of compensating work-related injury as a systematic structure concerning the relationship between tort liability litigation and workers' compensation social insurance program from the national level to the local level, Chapter 3 has given a critical review to the national workers' compensation regulations and the local enforcement regulations as well as the

related laws and interpretations in civil law system in China.

The structural analysis method renders possible a thorough examination of the provisions relating to the inter-relationship between civil litigation and workers' compensation social insurance program lying in Chinese workers' compensation legislation. Such thorough examination of the problem enabled by the structural analysis from the top to the bottom of the 'pyramid' has revealed the inadequacy of the legislation system in China concerning the relationship between the two compensation remedies.

B. Empirical Approach

As mentioned above, the empirical approach is the most distinct approach to be used in this paper from the ordinary approaches that most Chinese scholars have ever used in their research on the relationship between tort litigation and social insurance program in workers' compensation system. Since most of the empirical data or materials concerning this topic of China cannot be obtained from currently existing literature, empirical work thus becomes necessary and even crucial to the arguments and conclusion of this paper.

With regard to the empirical research, I have gone into the practical world of workers' compensation and observed how the collision of converging compensation systems has affected the functioning of the workers' compensation system in China. Case study is the main method in this empirical research work. I combine the documentary research, field research and individual experience to pursue the empirical research. The research work is a comprehensive interaction of them.

While I was in the Beijing Legal Aid Center of Migrant Workers where most of the empirical data for this paper was collected, I had the opportunity to involve in the settling of several work-related injury cases. Through intensively communicating with the lawyers who held deep understandings of workers'

compensation concerning this problem, my perspective to look into the relationship between tort liability action and workers' compensation social insurance program has been deepened down to the grounding world of workers' compensation practice more than the theoretical reasoning.

Although the case study part plays an important role in the empirical work, the document review cannot be underestimated. The purpose of the documentary research is to discover new material or viewpoint by gathering, comparing and synthesizing the current material. Reading the past documents (records of work-related injury cases settled by the Beijing Legal Aid Centre of Migrant Workers) to find the common features lying under the cases eases the work of categorizing the most representative workplace injuries concerning this problem.

Besides, by talking to the workers who suffer from the injuries about their difficulties of getting decent compensation from available remedies, I have learnt to focus not only on the basic framework of the workers' compensation system concerning the relationship between the two compensation remedies but also on the detailed operational considerations to guarantee the well-functioning of such framework. And sometimes the operational details weigh more in the sense of protecting substantially the injured workers from the employment. Apart from that, some empirical data deriving from the empirical surveys or projects conducted by the Beijing Legal Aid Centre of Migrant Workers in the past few years is extremely helpful to support some arguments in this paper.

C. Historical Study

The historical study mainly lies in Chapter 2 and part of Chapter 4 where the historical review of workers' compensation is needed. Taking a retrospect of the evolution of shifts of the compensation from tort liability system to social insurance system in the workers' compensation history is of great significance to a thorough examination of the relationship between converging compensation regimes. In Chapter 4, the historical approach is adopted and limited within the

part when the perception is undertaken of the trends of workers' compensation system concerning the interaction of the two remedies in the latest thirty years.

D. Doctrinal Study

The doctrinal research approach is used to analyze John Fleming's Model Theory in 1970s. The Model Theory, as the fundamental theoretical basis of workers' compensation model in adjusting the relationship between social insurance program and tort liability action, deserves to be explored thoroughly. From the theoretical phase, the doctrinal study is well suited to examining the merits and demerits of each model of the Model Theory.

V · BRIEF STRUCTURE

Chapter 2 presents a retrospect of the evolution of systems for compensating industrial injuries deriving from work. The chapter builds upon a variety of historical events in tort liability system and workers' compensation social insurance system. People today tend to think of tort liability system and social insurance program as two parallel compensation systems. However, the significance of the interaction between the two compensation systems concerning the compensation for work-related injury has made it necessary to trace back within the historical dimensions. The shifts of compensation remedies will be introduced separately in the three sections of Chapter 2 from the traditional tort liability system based on fault principle to the no-fault workers' compensation social insurance system, and to today's integration of social security system. Such changes of compensation systems which are described in Chapter 2 aim at reflecting people's tremendous endeavor of exploring a better workers' compensation system long before.

Chapter 3 focuses on the compensation system for work-related injury of China. Given that the two compensation remedies- workers' compensation social insurance program and tort liability litigation- can be resorted to for injured workers deriving from employment in China, these two remedies in workers' compensation system will be introduced and analyzed in a specific manner. Chapter 3 contains four sections. In the first and second sections, the legal framework for compensating workplace injury and connected issues in operating the two regimes will be highlighted and discussed, in addition to providing a most updated analysis of legislation and different views held by judicial commentators and scholars. In the third section, based on the discussion of the legal structure of compensating industrial injury, some unique problems existing in the Chinese system will be addressed in details. For illustrating the problems and situations in the third section, the fourth section introduces some first-hand empirical materials including cases and other data in Chinese workers' compensation practice.

Chapter 4 builds upon the Model Theory proposed by John Fleming in 1970s and its fundamental changes occurred in the past over thirty years. The four models of arranging workers' compensation social insurance program and tort liability litigation within workers' compensation system provides a theoretical template for a wide range of thinkers to embark upon while they explore a feasible model of workers' compensation system. To China, at the primary stage of devising a feasible structure between the two compensation regimes, the importance of the alternations since the emergence of the Model Theory cannot be underestimated either. Chapter 4 tries to perceive some trends underlying the changes happened to a number of western countries and to read the reasons behind such changes, and summarizes the corresponding changes reflected in the original Model Theory. Besides, a general survey of workers' compensation system structure concerning the adjustment of workers' compensation social insurance program and tort liability litigation is undertaken

based on the existing research since the Model Theory was proposed in favor of the workers' compensation systems in developed countries in 1970s. The conclusion of Chapter 4 provides some sort of hypothesis for envisaging the workers' compensation structure of China in the subsequent chapters.

Chapter 5 and Chapter 6 explore a feasible scenario for China which outlines the basic structure of devising the relationship between social insurance program and civil claim in workers' compensation system and offers the detailed operational considerations to guarantee the well-functioning of such structure.

In Chapter 5, the general structure of workers' compensation system for China is clarified through answering three questions step by step. Firstly, can either compensation system- the tort liability or the social insurance program – be replaced by the other in the compensation system for work-related damage? Secondly, if the answer is no, then in what sequence should the two compensation systems be arranged and which remedy should play the dominant role in the workers' compensation system of China? Last but not the least, should the duplication of compensation from the converging systems for industrial injury be permitted in China? To the above questions, various arguments, some of which are supported by the updated empirical evidence in China, are provided. The process of exploring the answers to the questions is considered as a way to find a clear and basic model of workers' compensation system in adjusting the relationship between the two remedies in China.

In Chapter 6, the concrete reform considerations relating to workers' compensation system in China are offered to complete the scenario of suggested model. Chapter 6 attempts to provide further suggestions in respect of the specific arrangement of tort liability system and social insurance program depending on the different types of industrial injuries in China. In each type of industrial injury, the current situation of compensation practice needs to be introduced first. Then the concrete reform suggestions based on such situations of what should be changed and the motives or reasons underlying the reform will

be given. Finally, the typical cases selected in Chapter 3 to illustrate the unique problems of Chinese workers' compensation system will be brought back in this chapter with the purpose of verifying the detailed reform suggestions.

CHAPTER 2 CONSTRUCTING A FRAMEWORK FOR COMPENSATING WORK-RELATED INJURY: AN IMPORTANT MISSION

This chapter will take a historical retrospect of the evolution of the systems for compensating industrial injuries deriving from work. People today tend to think of tort liability system and social insurance program as two paralleled compensation systems. However, the significance of the interaction between the two compensation systems concerning the compensation for work-related injury has made it necessary to trace back within the historical dimensions. Workers' compensation evolved for centuries in many countries especially where the industrialization took place earlier in the nineteenth century. The shifts of compensation remedies will be introduced separately in the three sections from the traditional tort liability system based on fault principle to the no-fault workers' compensation social insurance system, and to today's integration of social security system. Such changes of compensation systems have reflected people's tremendous endeavor in exploring a better workers' compensation system long before.

I. TORT LIABILITY AS TRADITIONAL REMEDY FOR WORKERS' COMPENSATION

From a legal point of view, the background against which compensation for work place injury must be viewed is the tort law and negligence, and a fundamental understanding of that background is, therefore, essential to an understanding of the dominant or even the only remedy of industrial injury before the nineteenth century. The employers' liability under tort system must be

viewed in the employment context, because it can be considered as the original source and still a significant common law remedy of workers' compensation system in a number of countries.

We tend to think of workers' compensation system in multiple contexts as tort liability or civil liability systems, private first party insurance programs, and social insurance schemes or social security systems. Indeed, given the scope of work-related injuries, illnesses and deaths that individuals and their families now face and have faced for decades, it is difficult to imagine workers' compensation existing without there also being other remedies except tort or civil liability.

In fact, however, tort existed long before there were such things as private or public insurance programs, or social security systems being the workplace injury remedy. We know without question that there was civil liability for certain form of injuries that were related to employment in medieval England and present European continent. The most significantly essential element for tort liability or civil liability regarding the compensation for workplace injury, however, is the negligence or fault principle, which determines the same evolving fate of tort systems in the regime of workers' compensation for centuries. In the continental law countries, according to French Civil Code Article 1382, the victims of the accidents have to prove that the injury is caused by the negligence or fault of defendant, if he or she wants to get compensation from the defendant.[30] Similarly, 1871 Liability Insurance Law of Germany allowed the employees to obtain compensation from the employers only if employers' negligence had been successfully proved to be the causation of employees' damages. Although Anglo-American law of torts and negligence developed over centuries and is largely the product of judicial decisions, which is an unusual phenomenon as compared with the legal systems of Continental Europe, which are based upon legislated code,[31] the common core factor of

[30] Jean-Jacques Dupeyroux, Xavier Prétot, Social Security Law, 2002, p. 13.
[31] Peter M. Lencsis, Workers' Compensation: A Reference and Guide, 1998, p. 5.

traditional tort especially, negligence is the one that matters closely to the similar evolving track of both tort liability and civil liability in the context of workers' compensation. Therefore, ignoring or paying less attention to the cultural and jurisprudential differences of the common law jurisprudence and the continental law system concerning the compensation concept which means to view the negligence laws in different legal systems as a whole, in some instance, will be helpful to understand better the role that negligence played in the context of workers' compensation before the end of the nineteenth century.

Since the late stage of the industrial revolution, the tort liability that ruled the compensation for industrial injuries has experienced a conceptual revolution that is among the most dramatic ever witnessed in the civil liability systems of highly industrialized countries. Legal doctrines that have been entrenched for centuries, and the attitudes and presuppositions that supported them, were suddenly repudiated and were replaced by rules and presuppositions radically different.

At the time of early stage of the industrial revolution or even earlier in the western world, recovery for injuries or deaths resulting from employment was determined solely by tort law, which based upon "no liability without culpability" principle. With the stress on the social desirability of free individual action and decision, the rule that liability should rest on a showing of fault completed its conquest of tort law.[32] Tort law that considered the rule of no liability without fault a legal absolute bored most heavily on the industrial workers. Tort law at that age of time largely served economically powerful interests, subsidizing industrial and commercial growth at the expense of the individuals who suffered accidental physical and mental harm related to industrial production.[33]

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[32] Bernard Schwartz, The Law in America A History, p122.

[33] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p18.

A. Contributory Negligence, Assumption of Risk and Fellow-Servant Rule

The tort law before and at early stage of the industrial revolution was stacked against the injured workers.[34] Before the middle of the nineteenth century, the scope of an employer's legal responsibility for work-related injuries was very limited. If the industrial accidents occurred, unless the injured worker had to prove that the employer was negligent itself or the employer was legally responsible for another employee's negligent act or omission that caused his harm, if he wanted to recover damages from his employer. Not only did the worker injured on the job had to prove negligence on the part of his employer, he had to overcome a number of limits on the scope of his employer's liability that was imposed by the traditional rules of negligence law. For example, the work-related accidental injuries were subject to existing defenses such as contributory negligence, assumption of risk, and the fellow-servant rule which developed to further limit the scope of an employer's liability.

A worker could be held "vicariously liable" to third parties for the negligence of a worker even if the employer was not himself negligent.[35] But under the "fellow-servant rule", with only a few exceptions, vicarious liability did not apply to the work-related injuries suffered by a worker owing to the negligence of another worker of the same employer. The employer was immune to vicarious liability in this situation. Besides that, even if an injured worker could prove the employer's own negligence, such as in failing to supply a safe piece of equipment or working environment, the worker could not recover if he was either contributorily negligent, or had assumed the risk that he would be injured, but chose to ignore it and take the risk posed by dangerous conditions on the job.

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[34] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p 41.

[35] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p 42.

The traditional rules of the tort law as the fellow-servant rule, contributory negligence, and assumption of risk, which were sometimes called "the unholy trinity" of defenses, made it extremely difficult for injured workers and their dependents to recover in tort for their injuries, illness or deaths resulting from work. These defenses also were the reflection of a nineteenth-century legal ideology of individual responsibility.[36] Given such ideology, employers could easily invoke an 'unholy trinity of defenses' that allowed them to evade liability for harm to workers at negligence rule of tort law in most countries of the world. One author notes, "One need not be a keen student of nineteenth century English history to sense that the servant did not bargain at arms' length with his master; that there was a dearth of jobs and a surfeit of labor; and that the hazards and risks of railroad, mine and factory were not fully disclosed to the servant by the master."[37]

Judicial opinion nevertheless continued to weigh in favor of employers, even in the face of the 'industrial slaughter' that was taking place at the time. Workers were left remediless in the vast majority of cases.[38]

B. Refinement of Tort System with Essential Features Retained

From the next half of the nineteenth century, many industrialized countries had an extraordinarily high level of industrial accidents, especially in Britain, US and Germany. The industrial injury had become a social problem which prevailed in the tension between employers and their employees. As Marx Karl has written in his book Capital, "Every sense organ is injured by the artificially high temperatures, by the dust-laden atmosphere, by the deafening noise, not to

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[36] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, pp 52-53.

[37] Tarpley, C.A., and K.E. Jagmin, Workers' Compensation: Third Party Actions against Employers under Comparative Causation. Journal of Air Law and Commerce, 1982, pp. 191-192; Citing Esther Shainblum, Terrence Sullivan, and John W. Frank, Multi-causality and Non-traditional Injury, pp. 60-61.

[38] Larson, A., The Nature and Origins of Workmen's Compensation, Cornell Law Quarterly 1952, p224-5.

mention the danger to life and limb among machines which are so closely crowded together, a danger which with the regularity of the seasons, produces its list of those killed and wounded in the industrial battle. The economical use of the social means of production, matured and forced as in a hothouse by the factory system, is turned in the hands of capital into systematic robbery of what is necessary for the life of the worker while he is at work, i.e. space, light, air and protection against the dangerous or the unhealthy concomitants of the production process, not to mention the theft of appliances for the comfort of the worker. Was Fourier wrong when he called factories 'mitigated jails'? "[39] Under such cruel working conditions, it was imaginable that extraordinarily high level of workplace injuries came like storms.

Given the rapid increase of workers that remained remediless from their employers under the injustice of traditional tort system, under the great pressure of labor unions' movement, quite a few changes have been made to the tort systems in all legal systems, some of which were dramatic. Among the changes, major ones were as follows.

First and most important, most countries created the employers' no-fault liability in contrast of the traditional fault liability, which meant that victims of all workplace injuries could recover from their employers without regard of anyone's fault. The cost of the product bears the blood of the working man.[40] And these have become the philosophical foundations underlying the no-fault workers' compensation legislation.

As workplace injuries seemed to escalate beyond control, the traditional system of tort law had a few crucial and fatal defects in dealing with the compensation of the employers who confronted the hazards and insecurities of industrialization, one of which was the basis of tort law, the fault principle.

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[39] Karl Marx, Capital: A Critique of Political Economy, volume I, pp. 552-553.

[40] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p18.

From the standpoint of tort liability, workers who suffered injuries arising from employment were often perceived as reckless or ignorant. They could completely control their own fate, it was believed, and were not forced to work at jobs that were too dangerous for them. Limits on the amount of work available, less-than-perfect mobility, and the necessity of sometimes choosing between working in a hazardous job and having nothing to feed one's family were all ignored.[41] In this view, accidents resulting from employment environment of which the injured worker had been aware were the worker's own responsibility, and arguably the worker's own fault. There was by no means anything the tort system should do to protect such a victim.

However, as the world witnessed the disproportionately increasing number of industrial accidents as never before, people could not stand the fault principle which not only indulge the employers' escape from their liabilities, but also encourage their dangerous exploration at the high price of workers' blood. Besides, ideas about the causes of accidents thus evolved that usually the negligence of workers and accidents in the hands of the god are unavoidable. As industrialization and mechanized transportation accelerated, many accidents involved the employees of new industrial and transportation enterprises themselves. In response to both the increasing number of on-the-job injuries and to the evolution of attitudes towards the causes of accidents, the employers' liability began to change its original doctrinal basis, from the fault principle to no-fault liability. The increasing threat of substantial employer tort liability and changing conceptions of the causes of workplace injury were mutually reinforcing.[42] Therefore, more and more people realized that the compensation for industrial accidents should be measured in an objective way which ignores the fault or negligence of employers or workers and pays most attention to the results or damages. Thus, there came the employers' no-fault liability which is

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[41] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p 53.

[42] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p 53.

reflected in the area of workplace injury as the statutory employers' liability. It focuses on the responsibility from a different angle which evolves from the responsibility to avoid negligently injuring others toward the responsibility to compensate for negligently caused injury when it occurs.

The no-fault statutory liability which was initiated first in the area of workplace injury had a profound influence on the fate of traditional tort system from workers' compensation to liabilities of other areas correspondingly in the following decades.

Some scholars hold the view that the employers' no-fault liability was the beginning of the tort reform. It is considered that the invention of the employers' no-fault liability from workers' compensation with comparison to other liabilities that based on negligence or fault was the original tort refinement. The no-fault liability is the modification of tort liability system as it adapts to more challenges brought by the industrialization, thus, it should be seen as an indispensable part of the tort system. One Chinese scholar who specializes in civil law wrote, "the no-fault liability was first initiated by the increase of industrial accidents, and it was the product of western countries' instrument for relieving the aggressive social conflicts between working and capitalist classes."[43]

However, in radical contrast to the traditional fault liability of tort system, a number of scholars consider the no-fault liability as a non-tort compensation method which is a type of liability independent from tort system.[44] One author notes, the no-fault liability "removed the most acute problem concerning accidents from the law of tort and put it into the law of social insurance," and "the rest of the law of tort could remain quietly in thrall to the traditional notion

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[43] Wang, Liming, Min fa. Qin quan fa, 民法：侵权法, Civil Law. Tort Law, Beijing: Chinese People University Press, 1991, p37.

[44] Famous Chinese tort law scholar, Professor Wang Zejian proposed the non-tort compensation in his book Tort Law, Vol.1, Chinese University of Politics and Law Publishing House, 2001, p25-6.

of the primacy of the fault principle".[45] This paper takes the opinion of latter one, which is also the opinion prevailing among the International Labor Organization and most international Social Security Law scholars. The further discussion of employers' no-fault liability in the workers' compensation programs within social security system will be of considerable meaning to understand one type of workers' compensation program derived from the Common Law jurisdictions.

Secondly, within the tort system, a few countries have extended employers' vicarious liability to a few more industries. Among the continental law countries, Germany for example, made the Imperial Law of Liability in 1872 to impose more vicarious liabilities or liabilities of supervisors on the employers of mining, quarries and factories.[46] The similar actions were taken by countries of the common law jurisdictions.

For the third instance, many countries began to make legislation of health and safety standards to restrict employers' behaviors. For instance, England's Employer's Liability Act in 1880 and several revisions of its factory legislation have imposed stricter safety obligation on employers, such as maintenance of machineries. These actions combined with growing recognition, especially among unions of England, of the tort law possibilities increased the number of tort liability claims against workplace injury. In the late 1970s, for example, job-related injuries or diseases generated about 117,500 tort claims a year or about 47 percent of the total tort claims.[47] In the United States, many states also introduced legislation for similar purposes, especially setting the special safety standards for certain industries as construction and mining to protect workers from hazards.

Apart from above, the common law jurisdictions have gradually eliminated

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[45] K. Zweigert and Hein Kotz, An Introduction to Comparative Law, Third Edition, p648.

[46] Rui, Lixin, Research on Several Legal Issues of Workers' Compensation Social Insurance. in: Zou, Hailin (ed.). 社会保险改革与法制发展, The Reform of Social Insurance in China and the Development of Legal Systems. Beijing: Social Science Publisher. 2005, p157.

[47] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation,1992, p127.

the "unholy trinity defenses" that rooted deeply in the tort system. England abolished the defense of Contributory Negligence Rule in 1945, and then the Law Reform (Personal Injuries) Act abandoned the defense of common employment (acts caused by the Fellow-Servant Rule) in 1948.[48]

Last but not the least, the compulsory purchase of employers' liability insurance has also contributed a lot to the modification of tort system. The principal function of this form of insurance was to cover employers' liability to their employees to strengthen the financial capability of compensation as the extension of employers' liabilities due to the emergence of strict liability rule within tort system. England made the 1969 Employers' Liability Insurance Act to require all employers to purchase employers' liability insurance from the insurers prescribed by the government to cover tort claims of workplace injury. Similarly, by the turn of the twentieth century, employers' liability insurance had become an established ingredient of the U.S. tort system.

All the changes above had been made by most countries of the common law systems to retrieve the compensation for industrial injuries within the tort system. However, given the rapid process of industrialization under way, the modification of tort system with its essential feature, -the fault principle- retained still could not stop the transformation in the law governing workplace injury from the twentieth century. When the common law scholars and policymakers were wondering and thinking about the methods to refine tort system to keep workers' compensation from separating from tort system, some of the continental law jurisdictions had begun to explore some other initiative ways to resolve work-related injury problems apart from tort system. With the development of legal conceptions and operations towards human society in the modern world, the social security system which represents a brand new perspective to view the compensation of occupational accidents and diseases has

[48] Rui Lixin, 社会保险改革与法制发展, Several Issues of Workers' Compensation, The Reform of Social Insurance in China and The Development of Legal Systems, 2003, p153.

led to the revolutionary emergence of no-fault workers' compensation program at the end of the nineteenth century. A brand new no-fault remedy for industrial injuries began to show up on the stage of workers' compensation system.

II. WORKERS' COMPENSATION: FORERUNNER OF NO-FAULT SOCIAL INSURANCE PROGRAM

As discussed in the previous section, to overcome the challenges brought by the industrial revolution, people had taken the attempt to use the employers' no-fault liability and many other measures to modify the tort liability system to cover employers' responsibilities to their employees. However, workers' tort rights and consequently their prospects for receiving compensation for injuries suffered on the job were very limited, which means that the employers' liability locked in the restriction of the tort system did not substantially by any means eliminate certain practical or doctrinal limitations adopted in the workplace injury. The employee who contemplated bringing a tort suit against his employer still faced a steep uphill legal battle.[49]

The limitation of tort liability system led to the urgent need for a transformation in the law governing work-related injury through enacting special workers' compensation acts or making workers' compensation laws. And this revolutionary transformation brightened the injured workers' prospects by the turn of the twentieth century.

At the time when employers' no-fault liability in the form of special workers' compensation laws departed from the tort system, the workers' compensation program showed on the stage of connecting point of the nineteenth and twentieth century. It is conceived as the forerunner of original

[49] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p39.

social security programs in modern countries of the world.

Workers' compensation insurance program is understood as a no-fault social insurance concept, similar to no-fault automobile insurance, that mandates the payment of statutorily defined medical, disability, and other benefits to injured workers (or employees) without regard to fault as a cause of the accident (or disease) in question.[50] Workers' compensation programs which provides compensation for work-connected injuries and occupational illnesses, is the oldest and most widespread type of social security.[51] The types of workers' compensation programs differ widely throughout the countries of the world.

Most countries having workers' compensation programs including Germany and China, take the form of organizing the social insurance program through a central public fund. This workers' compensation program may or may not be a part of the general social insurance or social security system. All employers subject to the program must pay contributions to the public carrier of the central fund, which in turn pays the workers' compensation social insurance benefits.

Countries that rely primarily on private arrangements, including United States and England, require employers to insure their employees against the risk of employment injury.[52] However, in some of these countries, only private insurance is available; in the remainder, a public fund does exist, but employers are allowed the option of insuring with either a private carrier or the public fund.[53]

No matter either form of workers' compensation insurance program is adopted, most countries have established their workers' compensation programs owing to the dissatisfaction with the tort law responsibilities of employers,

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[50] Peter M. Lencsis, Workers Compensation: A Reference and Guide, 1998, p1.
[51] Social Security Administration, Social Security Programs Throughout the World-1997, xx.
[52] U.S. Social Security Administration, Social Security Programs Throughout the World-1997, xx.
[53] U.S. Social Security Administration, Social Security Programs Throughout the World-1997, xx.

which in some nations employers' liability statutes that modified the tort law but retained its basic features -[54]the negligence principle (most have been discussed in the previous section). Therefore, the workers' compensation program is also called the non-tort compensation program to differentiate itself from the traditional tort compensation system. In general terms, workers' compensation programs make employers liable for accidental injuries or diseases to employees that arise out of and in the course of their employment, regardless of the presence of fault on the part of the employee or the employer or even the third person sometimes.

Today, workers' compensation programs have become the major resource of recovering from the work-related injuries, diseases and deaths. The process of the emergence and development of workers' compensation does not only reflect the switch of liability rule from tort fault liability to strict liability or no-fault liability, but also means a shift of governing law from private tort system to public social security system. Workers' compensation is the reason for both the refinement of tort system and the prevailing adoption of work-related injury programs within social security systems in most industrial countries.

Workers' compensation program, in effect, guarantees the injured workers against the risk of damage on the job, by providing them with prompt compensation of at least proportion of the lost salary and medical expense for the injury or disease. No longer are the workers at the mercy of the tort liability litigation system that has promised substantial compensation to the very small number of injured victims of work-related injuries who are entitled to recover under tort law, but at the same time supplies no compensation to the far greater number of workers who have no such good luck.

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[54] U.S. National Compensation on State Workmen's Compensation Laws' Compendium on Workmen's Compensation, 1973, Chapter 2.

A. Original Establishment of Workers' Compensation Insurance Programs: Germany Model and England Model

Workers' compensation as it ultimately sooner or later materialized into most industrialized countries had one origin in the laws of either Germany or of England, due to the different legal systems and traditions.[55] Therefore, the introduction and analysis of the establishment of both countries will be of considerable significance to the understanding of workers' compensation insurance programs as part of the social security system.

Generally, there are two basic types of workers' compensation systems throughout the world: social insurance systems utilizing a public fund, and various forms of private or semi-private arrangements required by law.[56] That is the "insurance model" which is initiated by Germany, and the "liability model" which is as typical as England. All other countries take the liability form or insurance form of workers' compensation program imitated either of Germany or England.

Germany was the first nation to have a workers' compensation social insurance program. Many nations soon copied at least part of the German program. Consequently, its workers' compensation program has become the primary model for the social insurance programs against work-connected injuries adopted world-wide nowadays.

Traced back to Prussia, as early as in 1838, Germany has begun its project of no-fault legislation. What Prussia had was, in effect, a strict or absolute liability law which only applied to railroads in Germany. It provided that the employers should be responsible for all accidents happened in the railroad industry that were neither unavoidable nor the workers' fault. Although limited in its application to railroads, this statute is often cited as the initial step toward modern workers' compensation programs.

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[55] Peter M. Lencsis, Workers Compensation: A Reference and Guide, 1998, p10.
[56] Social Security Administration, Social Security Programs throughout the World-1997, xx.

Otto von Bismarck, who was the Chancellor of the German Empire, established the first national social insurance system for workers under legislation enacted during 1883-1889.[57] This action has much to do with the rapid rise of the Socialist Party in Germany during the 1870s. The original aim of this law was intended in part as a response to the socialistic tendencies within the labor movement arising at the end of the nineteenth century. Bismarck then decided that the best way to halt socialism was to demonstrate that the state could accomplish some of the practical aspirations of the Socialists better than the Socialists themselves.[58] Motivated by this idea, in 1881 the German government introduced an Accident Insurance Bill that would have created a workers' compensation bill as the first component of the new social insurance system.[59] After little discussion and slight revision, the Accident Insurance Bill was enacted on July 6, 1884, which was the cornerstone not only of German workers' compensation insurance program, but also of the similar programs of most other countries of the world.

The Accident Insurance Law covered mines, quarries, shipyards, almost all manufacturing firms, dredging, public utilities, and storage warehouses. All employees earning less than 3,000 marks were automatically covered.[60] It involved the contributions by employers and workers to diversified kinds of industry accident insurance funds under the supervision of the government. Only accidents arising out of the course of the work were covered, while occupational diseases were not. Dependents of workers who died due to a work-related injury received benefits from the accident fund. All employers were required to purchase insurance from the mutual association that generally included all the employees in a single industry in the empire.[61]

Workers' compensation program of Germany as the earliest social insurance

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[57] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation, 1992, p123.
[58] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation, 1992, p123.
[59] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation, 1992, p124.
[60] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation, 1992, p124.
[61] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation, 1992, p125.

program, and the basic structure of the contributions, benefits, consisting primarily of all medical costs and part of the lost wages, was the original feature of the workers' compensation social insurance law and also the workers' compensation program nowadays. With seldom revision, it has taken effect for over a century. It has made a substantially great contribution to the stable society and high economic development in Germany.

The other leading original model of workers' compensation programs derives from England. England deserves special attention for the reason that, unlike other pioneering nations enacted workers' compensation laws early which relied heavily upon the German precedent, England chose an approach that differed from the German system in several fundamental ways. As the most typical common law country, England was always among those that persisted on tort system. Therefore, even if the tort liability system was criticized by most people, England would rather try to find the answer within the tort system through numerous tort reforms.

England has refined the tort liability of employers to some extent in 1880 by the Employers' Liability Act, which provided that supervisory workers were not to be considered as fellow servants for the purpose of applying the fellow-servant rule. Until 1897, England finally realized that mere refinement of tort system could not solve the compensation problems of workplace injuries. Following the German example, the English Parliament thus adopted a true no-fault law called the Workmen's Compensation Act of 1897, in which the phrase "arising out of and in the course of employment" was first used to define the occupational injuries and diseases that were covered by the special legislation.[62] The major purpose of the 1897 Act was to replace the common law and the employers' liability remedies that required the employee to prove that the injury or disease was caused by the employers' negligence.[63] At the

[62] LARSON, Sec. 6.10, Peter M. Lencsis, Workers' Compensation A Reference and Guide, Quorum Books, 1998, p11.
[63] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation, 1992, p133.

beginning it was only applied to the dangerous activities related to the employment similar to 1838 Prussia legislation, and contained no insurance or funding requirements.[64] Its application scale was enlarged to most other kinds of activities in the employment in 1906, and consolidated in 1925 and 1934.

The distinctive feature of the 1897 Act was that, after a work-related injury, an employee was allowed either to accept no-fault compensation under the Act or to pursue a tort liability action for his damage. Although employers were assigned complete financial responsibilities for the benefits under the Act, and neither employees nor the government were asked to contribute to the system, employers were not required to purchase insurance. And this feature was by no means the same as that of German workers' compensation program.

To summarize, the workers' compensation system established by the 1897 Workmen's Compensation Act as amended was not the exclusive remedy of the employee, covered most employees, provided no medical care or expense benefits, related disability and death benefits to past earnings, provided lifetime pensions for permanent disabilities, did not involve the government except through the courts, and did not require employers to insure themselves against their workers' compensation obligations.[65]

Therefore, England's 1897 Act initiated a distinctive type of workers' compensation program through taking the form of employers' no-fault liability program, without the necessary participation of insurance system. Certain features were quickly imitated by other countries, for instance, the United States and Denmark. As Bartrip observed, official circles never developed any enthusiasm for the German model or any other overseas development; British policy makers seldom looked abroad for answers to solve social problems partly, according to Bartrip, because the hub of a great Empire was more inclined to

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[64] LARSON, Sec. 6.10, Peter M. Lencsis, Workers' Compensation A Reference and Guide, Quorum Books, 1998, p11.

[65] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation, 1992, p134.

export than to import answers.[66]

As the subject of hot debates and several amendments during the decades that followed, but not until 1948 were its fundamental features altered. William Beveridge who was the chairman of Inter-Departmental Committee on Social Insurance and Allied Services of England, indicated in his Beveridge Report of 1942, which is still referenced numerous times nowadays, the disadvantages of workers' compensation program of England and made some suggestions of social insurance programs on workers' compensation. Some of his advice was taken by Churchill's Caretaker Government in the 1946 National Insurance (Industrial Injuries) Law, which introduced the workers' compensation program of today's England, then became the model for New York and other jurisdictions of North America.

The different features of workers' compensation programs of the two leading countries may attribute to traditions and histories. The English legal background was the traditional body of negligence law as applied to the master-servant relationship. Modifications in the law of negligence, particularly the defenses available to an employer in a negligence case, were made through employers' liability acts, thus led to the "liability model" of workers' compensation programs followed by many other common law jurisdictions; while the German legal background, on the other hand, took its first step toward workers' compensation through introducing the innovative concept of shared social view of responsibility for industrial accidents. Therefore, German legal transformation of workers' compensation programs which were adopted widely by most countries all over the world including China involves a radical departure from the traditional tort fault liability system. And this perspective has also contributed considerably to the foundation of modern social security law as the most important part of public law through the social insurance model for workers' compensation programs.

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[66] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation, 1992, p135.

B. Workers' Compensation Programs: A Historical Trade-off

Considered as the most successful and fundamental tort reform, workers' compensation tends to be said as a trade-off to limit workers' rights of tort claims for the exchange of a relatively less but guaranteed recover benefits for occupational injuries.

Today, we take the workers' compensation insurance program for granted as a compulsory insurance program all over the world which aims to protect injured workers against the damages stemming from workplace accidents. As to the two distinct origins of workers' compensation discussed above depending on the different legal systems and traditions, the common feature of the workers' compensation programs derived from these two origins is the attribute of insurance to guarantee that accidents suffered and illness contracted during the course of employment receives special treatment.

Workers' compensation is a trade-off of certain workers' rights for others, and of certain employers' obligations for others.[67] It requires employers to provide adequate but defined benefits to the victims of work-related accidents, while eliminates the delay, expense and arbitrariness of tort law litigation.[68]

Despite some distinctions lying in the institutional structures of different countries, the basic workers' compensation insurance program was and still comprised of three common features.

First feature of workers' compensation insurance program is that it permits the immunity from tort liability for the employers against the work-related injuries. During the evolving process of workers' compensation insurance program, it experienced the partial immunity to the complete immunity period.

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[67] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p 57.

[68] Orin Kramer and Richard Briffault, Workers Compensation Strengthening the Social Compact,1991, p 2.

Some versions of the program, England for example, allowed the workers to choose between suing in tort claim or workers' compensation insurance, and then evolved to the only option of workers' compensation program. Nowadays, some jurisdictions still preserve the election way at the outset of the work, but virtually no one choose out of workers' compensation insurance program. Some other early versions of workers' compensation program limited the application of the immunity to only the extra hazardous employment activity; however, within a few years such restrictions also were removed in most countries or districts. Therefore, for all the practical purposes today, workers' compensation program involves automatic immunity of tort liability for employers, except for the work-related injuries caused by employers' intent or other behavior nearly as blameworthy.

The second feature of workers' compensation program is the mandatory imposition of a new form of liability which is the employers' no-fault liability with comparison of the traditional fault liability. Under workers' compensation insurance program, the employers are liable for their employees' injuries, diseases or deaths arising out of or in the course of employment regardless of their fault, negligence or other inevitable accidents. The absolutely no-fault liability eliminated the traditional "unholy trinity" of defenses that considerably impeded workers' recovery rights from tort liability system. Thus, the only defense of the employer under workers' compensation program to a claim would otherwise be covered was that the worker had engaged in a wilful misconduct to injure himself on purpose.

The last common feature of workers' compensation insurance program involves an extended coverage of insurance and a subsequently reduction in the compensation that was awarded to the injured worker. Since the recurring pain of tort system – fault principle-had made it so difficult for workers recover from employers for work-related accidents, the no-fault principle of workers' compensation addressed that problem by broadening and liberalizing the

compensable accident and thereby making compensation more widely and frequently available to injured workers. Consequently, more workers being involved in the insurance program of workers' compensation meant less compensation benefits every member of the group could get from the funding. Workers' compensation insurance program pays only part of the medical expenses and lost wages, but nothing for a penny of the pain and suffering. In the early workers' compensation statutes, the first two or three weeks of wage loss also were excluded, and loss was payable only for a maximum number of weeks, typically lasting several years but then terminating.[69]

The three common features of the basic workers' compensation insurance program contribute some proof that workers' compensation is thus a trade-off of workers' rights of suing tort claims to get full compensation against their employers for certain limited amount of insurance benefits guaranteed only for the basic need of living. Workers gain a much broadened and liberalized compensable occasion on the employment, which affords them the entitlement to obtain compensation under the circumstance of any work-related injury. However, the portion of compensation that workers receive is considerably smaller than they could theoretically have recovered in a successful negligence tort action against their employers. Conversely, employers are relieved of the liability for full damages in those relatively occasional events in which they would previously have been liable, in return for being automatically responsible for paying smaller amounts to a much larger group of accident victims, including many whose injuries are not caused by anyone's negligence or fault.[70]

Clearly, workers' compensation insurance program is conceived as a result of the industrial revolution. It is not a simple success of labor over capital during an era at the turn of the twentieth century when labor power was strengthening.

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[69] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p 56.

[70] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p 57.

The whole adoption of worker' compensation as a basic social insurance program all over the world is the result of comprehensive historical factors involving the coalitions of labor, the debate of policy maker and at least a substantial portion of the business community.[71]

III. WORKERS' COMPENSATION INSURANCE PROGRAM INTEGRATED INTO SOCIAL SECURITY SYSTEM

In this section, the position of workers' compensation insurance program in social security system and the certain social security program in the whole workers' compensation system will be discussed. It seems like a twister. What usually makes people confused and needs to be clarified is that the term "workers' compensation" functions like a pun. Despite different types of languages, workers' compensation with its name has two meanings. One is used to describe the whole compensation system against all the injuries, diseases, and deaths arising out of or in the course of employment, which includes no-fault workers' compensation laws, civil or tort law and massive subordinate legislation accompanied those laws, legal and administrative institutions and so on as diversified remedies for workers to recover against work-related injuries. In this situation, the workers' compensation involves different legal resources like tort liability claims and social insurance programs, sometimes the rehabilitation programs included to a broader sense of the workers' compensation system; on the other hand, meanwhile, the narrow term of workers' compensation also represents the no-fault social insurance program embodied in whatever is essential about the social security system, which compensates injured victims without regard to the cause of anyone's fault. Therefore, it needs to differentiate them with different phrases as workers'

[71] Orin Kramer and Richard Briffault, Workers Compensation Strengthening the Social Compact,1991, p 2.

compensation program (the narrower one, and sometimes workers' compensation) and workers' compensation system (the broader one).

The pun-like name of workers' compensation indicates itself, undoubtedly, that the workers' compensation program is a special but an increasingly significant component of social security system in many modern industrialized countries nowadays. Moreover, it also means that the social security program which has internalized the workers' compensation social insurance program for work-related injury (certainly in many countries workers' compensation program still remains its independence) is the major remedy within the whole workers' compensation system in most industrialized countries all over the world.

The industrialization and people's exploration of better compensation for the work-related injuries supplied the social and philosophical foundation of social security in modern legal jurisdictions, thus in the eyes of a number of law scholars, it has led our world from civil law dominated era to post-civil law dominated era. Because the notion that the injured, disabled and dead from work-related accidents, might be the victims as much of social malfunctioning as of their own ineptitude has been a more or less powerful motive in social security legislation.[72]

The term social security has neither legislative definition, nor commonly accepted definition.[73] And the expression of social security has acquired a wider interpretation in some countries than in others due to traditions, histories and cultures. Basically, the International Labor Organization has publicized that the social security can be taken to mean the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury,

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[72] Orin Kramer and Richard Briffault, Workers Compensation Strengthening the Social Compact,1991, p 134.

[73] Jean-Jacques Dupeyroux and Xavier Prétot, Social Security Law, 2002, p 2.

unemployment, invalidity, old age and death, etc.[74] Besides, in the social security programs report published by the Social Security Administration in United States, the term social security refers to programs established by statute that insure individuals against interruption or loss of earning power, and for certain special expenditures arising from marriage, birth, or death.[75]

Judging from the official definitions of social security in the general sense, the right of an injured worker on the job should be taken into account of the social security right. The injured worker belongs to the type of those protected by social security and it should be a guaranteed right of the workplace victims entitled by social security programs due to a social responsibility to every member of the group, which is the nation or district.

It has been widely accepted that workers' compensation was, and remains, a great social insurance system serving all of its traditional functions.[76] Society as a whole benefits from justice for workers, the elimination of a source of worker-employer conflict, improved occupational safety, reduced litigation, and the protection of the public treasury from the claims of disabled workers and the survivors of the victims of industrial accidents.[77]

Certain characteristics make the workers' compensation insurance program distinct from the private insurance programs, and also the tort liability remedies in which the criteria will more or less affect the judge to decide the amount of compensation given to the injured worker. Since the covered worker and his employer participates the insurance program through the premium, the worker can claim the benefits as a matter of right. The workers' compensation insurance program being a social insurance program, bases on premium[78] payments and

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[74] International Labor Organization, Introduction to Social Security, Geneva 1984, p 3.
[75] U.S. Social Security Administration, Social Security Programs Throughout the World-1997, xx.
[76] Orin Kramer and Richard Briffault, Workers Compensation Strengthening the Social Compact,1991, p3.
[77] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation, 1992, p 201.
[78] The payment which the covered employers make into the workers' compensation insurance program on a regular basis is called premiums.

the right to insurance benefits[79] when the insurable event occurs which appears to be the negative damages derived out of the employment. The amount of the benefit is fixed in advance, thereby being made certain and predictable, rather than subject to some varied discretion. Besides, the beneficiary to the insurance program as a statutory right on the occurrence of work-related contingency, is by no means related to the eligibility as determinants of the amount of benefits, such as whether the injured worker has other resource of income; his life style, morals, etc. Therefore, the right to get compensation for the damage on the job should be considered as the most basic right entitled as the development of modern industrialized society.

Conceptually, the workers' compensation program in the form of social insurance has become an indispensable part of social security system. According to a study by the American Insurance Association, 136 countries around the world had a workers' compensation program of one kind or another as of 1989.[80] Of the 136 nations in this study, 89 have made their workers' compensation program part of a general social security system.[81] Until 1995, the number of countries has reached 160. Among the countries and districts which set social security systems, 70% began their social security programs solely with workers' compensation insurance programs, and 13% of others with workers' compensation insurance programs combined with other programs as pensions, medical or old age programs.[82] Since workers' compensation program tends to be as social insurance program in most countries of the world. Social security appears as a broad conception covering statutory assistance, social insurance and state benefits.[83]

In Germany, since its first social security system was founded in 1880s

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[79] When the specified event happens (injury, sickness, and death on the job), the covered worker or his dependents receive payments on a regular basis which are called the insurance benefits.

[80] U.S Chamber of Commerce, 1997 Analysis of Workers' Compensation Laws (Washington D.C.), p26-31.

[81] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation, 1992, p 201.

[82] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation, 1992, p 201.

[83] ISSA, Recent Developments In the Field of Social Security, Geneva, 1954, p18.

under Bismarck, the workers' compensation program which was the pioneer of social insurance program had been taken into the framework of German social security system for granted from its establishment until now. Following German Bismarck's model, most countries of the Western European Continent have adopted the broader social security conception nowadays to make the on-the-job disabled and sick workers benefit enlarge to the maximal extent. Apart from these countries whose social security system has included the workers' compensation insurance program since it was born, the workers' compensation programs in a number of countries have experienced an evolving process before becoming a part of the modern social security systems, among which the most typical is Britain. British workers' compensation scheme before 1970s existed for decades as an independent social insurance scheme, as many other separate and heterogeneous schemes which all aimed at abating a "given social evil". Until 1975 when the modern British social security system emerged through amending and consolidating the existed insurance acts, thereby leading to the present consolidation, the Social Security Act 1975, which combines the industrial injuries scheme (the National Insurance Act) with the general insurance scheme.[84] Nevertheless, there are still some jurisdictions that worry about the negative effects of exclusively depriving the independency of workers' compensation scheme and are hesitating in front of the gate of their social security systems such as United States and some of the common law jurisdictions.

The workers' compensation program has tended to be considered a necessary, basic social welfare arrangement, even in many countries that have no other forms of social benefits.[85] And some of these systems, in highly developed industrialized countries, are integrated with varying degrees into broader social security or welfare programs; while some to such an extent that workers' compensation rests or virtually rests to exist as an independent program. The

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[84] Calvert Harry, Social Security Law, London 1978, p5.

[85] Peter M. Lencsis, Workers' Compensation A Reference and Guide, Quorum Books, 1998, p14.

workers' compensation programs throughout the countries of the world thus are organized in different forms.

Basically, the countries which have a workers' compensation program with the social insurance attribute can be categorized into three major security systems:[86]

For the first instance, workers' compensation programs are integrated as part of a general social security system covering perils such as poor health, death, and old age. This means that under the general social security system, the system cannot distinguish between work-related injuries and diseases and non work-related illnesses. This organized form relies on two fundamental arguments. First, the loss of earnings and medical care needs are the same whether the worker is the victim of a work-related incident or a non work-related incident. Second, a major problem and source of litigation under separate workers' compensation programs is determining whether the injury or disease arises out of and in the course of employment. The qualifying conditions, benefits, and administration, as compared with next two forms of organization are better coordinated. The countries take this organized form include Algeria, Colombia and Britain.

The second organized form of workers' compensation program is the independence of other social insurance programs within the social security system, and workers' compensation is a compulsory insurance program. The compulsory workers' compensation insurance program recognizes the special needs of the person with a workplace injury or disease which, supporters assert, demand special treatment.[87] For the work-related injuries and diseases tend to have the attributes that may require different medical care and rehabilitation. The countries which take this form of workers' compensation program include Belgium, Italy, Germany, China, Japan, and Canada, etc.

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[86] The categorization see ILO and PRC Labor and Social Security Department Training Drafts, Unemployment, Medical Care and Workers' Compensation Social Insurance, p257.

[87] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation, 1992, p 7.

The third form is similar to the second one, which is a separate system, but what's different is the voluntary workers' compensation insurance approach. This form of organization of workers' insurance program usually is combined with other programs or remedies for work-related injury and disease in the countries which apply it. Therefore, the workers' compensation systems in such countries are relatively complicated on the statutory and operational level.

However, it does not matter whether the workers' compensation program has been incorporated into the framework of one country's social security system, or has still existed as an independent compensation program. The supposed social insurance attribute of the workers' compensation program embodies its characteristics as the social security remedy.

Therefore, judged not only from its position of the cornerstone in the history of social security law, from a great number of merger actions into the legislation and funds of social security framework, but also from its essential social insurance features, the workers' compensation program will make the omission from social security system disappear. Undoubtedly, the workers' compensation program, as a type of social insurance program created in the beginning and steadily fostered ever since its emergence from the end of the nineteenth century, is playing a dominant role in the broader workers' compensation system.

This chapter has taken a specific retrospect of the shift from tort liability system to workers' compensation social insurance system for compensating work-related injury. For several decades, the workers' compensation program has been proudly applauded by most social security law scholars as the original tort reform and still is the most fundamental and successful tort reform ever undertaken.

For tort liability system, workers' compensation was the first battle field

where it lost dominant control and thereby leading to the result that its essential fault principle showed malfunction in a series of liability areas in the next few decades from the turn of nineteenth century. Standing at the beginning of the twenty-first century, the workers' compensation is always a place that tort system unwilling look back upon, and in front of which, the tort liability more or less seems to be lack of confidence. Although the passage of time has eroded the tougher elements of traditional tort law doctrine and enhanced the position of plaintiffs, even today the tort liability system cannot offer the promise to work-related accident victims as it could not before.

Therefore, the compensation remedy for industrial injury has been avoided and the workers' compensation has been marginalized by tort liability system for decades. Due to the negative attitude that tort liability system has showed towards industrial injury, workers' compensation programs under social security system thus draw more attention and people today tend to think of compensation system for workplace victims even in the absence of tort system. However, it is hard to say that the tort liability will gradually and finally disappear in the workers' compensation system. As the time passes on, exploring a better way of compensating work-related injury, concerning the relationship between tort liability and social insurance program is and will be a significant question that we must confront with.

CHAPTER 3 WORKERS' COMPENSATION SYSTEM IN CHINA: STRUCTURE AND PROBLEMS

This chapter will focus on workers' compensation system in China. Similar to the practice of workers' compensation systems of many other countries, injured workers on-the-job are covered by two major remedies in China: the workers' compensation insurance program and the civil liability system. These two remedies in workers' compensation system in China will be introduced and analyzed in a specific way. This chapter contains four sections. In the first and second sections the legal framework for compensating workplace injury and connected issues in operating the two remedies will be highlighted and discussed, in addition to providing a most updated analysis of legislation and different views held by judicial commentators and scholars. In the third section, based on the discussion of the legal structure for compensation for workplace injuries, some unique problems of the Chinese system will be addressed. The fourth section introduces some first-hand empirical materials including cases and other practical data for illustrating the problems and situations in China.

I. WORKERS' COMPENSATION INSURANCE PROGRAM IN CHINA

A. Establishment and Development of the Insurance Program

The workers' compensation insurance program in China was first established during the early years of the People's Republic of China (PRC). On 25 February 1951, the Government Administrative Council (now the State

Council) promulgated the Labor Insurance Regulations. In 1953 the same Council issued the Decision on Several Amendments Regarding Labor Insurance Regulations. Both laws signaled the preliminary establishment of workers' compensation social insurance system of China. After that a series of minor amendments were made, mostly focusing on extending coverage and increasing benefits. In 1957, the PRC Ministry of Health listed 14 categories of occupational diseases, which brought further expansion of labor insurance coverage. The workers' compensation system in this period served a significant function in protecting workers' safety and health during employment in cities and townships throughout the country.

However, the so-called "Cultural Revolution" in 1966 led to disastrous damage of the social insurance system for workplace injury. The workers' compensation insurance together with other social insurance programs were reduced to what was called "Enterprise Insurance" which is a de facto no-fault employers' liability, meaning that all the responsibilities for work-related injuries, deaths and diseases, had shifted to the shoulders of individual enterprises. After 1976, China started its economic reforms, moving away from the planned economy to some sort of market economy. The deficiency of the existing Enterprise Insurance soon surfaced. The old industries were left to bear the historical burdens of the injured, dependents of deceased workers from the past, as well as increased medical costs and aftercare of new injuries.

For the purpose of putting the market economy in a better shape, enhancing a reasonable labor force flow, and improving workers' safety and health on the job, the former Ministry of Labor issued Provisional Provisions on Workers' Compensation Insurance for Enterprise Employees (Ministry of Labor Decree 1996 No. 266) which was the cornerstone of current workers' compensation social insurance program in China. But the PPWCIEE is only a ministerial level regulatory document, which has weak legal binding effects.

After that, the Regulations on Workers' Compensation Insurance (RWCI)

(State Council Decree No. 375) promulgated on 27 April 2003 (effective from 1st January 2004) brought about a revolutionary breakthrough for China's work-connected injury social insurance system, ushering in a new era of social insurance system in China.

The RWCI is the major legislation in workers' compensation insurance program, under which the insurance is compulsory, which forces all employers to join and contribute to the insurance funding. The RWCI, together with provincial regulations about operational details and amounts of compensation benefits drafted by provincial governments, forms the substantial legislative framework of workers' compensation insurance program in China. In 2003 the Ministry of Labor and Social Security drafted ministerial decrees stipulating "work-connected injury assessment procedure", "the definition of benefited dependent relatives in case of death in work-related injury", and "lump sum compensation for victims of work-related accidents in illegal employment" (e.g. working in illegally registered enterprises, or child labor, etc.); all these decrees become the effective supplement to workers' compensation insurance program in China.

B. Workers Covered by Workers' Compensation Insurance Program

To collect workers' compensation insurance benefits, a worker must be engaged in covered employment and the social insurance program covers all wage and salary workers. Specifically, the employees working in various types of enterprises in China, including state-run enterprises, large collectives in the municipalities, small enterprises, and registered individual enterprises (having 2 to 7 employees or apprentices) as well as non-profitable organizations, are covered. The program explicitly excludes certain workers due to the nature of their work, such as casual labor and domestic service. It expects the institutions and organizations of local governments to set up separate compensation

programs for them.[88] The program has a number of loopholes or confusion in the personal coverage aspect, thereby indirectly allowing some unethical employers to take advantage of the system and avoid the responsibilities for workplace injuries.[89]

C. Access to Workers' Compensation Insurance Program

For an injury, death or disease to be compensable under workers' compensation insurance program it must be job-related. Determining whether an injury or disease meets this requirement is one of the most difficult tasks faced by program administrators.

The RWCI Articles 14, 15 and 16 have given the description of the conditions of workplace injuries from the positive and negative sides.[90] To

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[88] PRC Regulations on Workers' Compensation Insurance, Article 2; Interpretations of PRC Regulations
On Workers' Compensation Insurance, Chinese Law Publishing House, p5.

[89] The coverage problem in China has a few unique characteristics, and is a crucial sticking point of workers' compensation insurance system of China which will be embodied and reflected in the discussion of unique problems of Chinese workers' compensation system in the next section of this chapter.

[90] Article 14 An Employee shall be determined as having a work-related injury if :

1. he is injured in an accident at work during working hours in the workplace ;
2. he is injured in an accident while engaging in preparatory or finishing-up work related to work before or after working hours in the workplace ;
3. he is injured by violence or in other accident in his performance of job duties during working hours in the workplace ;
4. he suffers from an occupational disease ;
5. he is injured at work or his whereabouts became unknown in an accident, during work-related travel ;
6. he is injured in a motor vehicle accident while going to or returning from work ; or
7. he is in other circumstances that shall be determined as work-related injury according to the provisions of laws and administrative regulations.

Article 15 An Employee shall be deemed as having a work-related injury if :

1. he dies immediately or within 48 hours after emergency treatment for a disease suddenly arising during working hours in the workplace ;
2. he is injured in an act to protect national interests or public interests such as emergency rescue and disaster relief ; or
3. he is injured and disabled in war or on duty while in military service and has obtained a revolutionary injured and disabled soldier certificate , and suffers from a relapse of the old injury while being employed by the Employer.

Where an Employee is in the circumstance of Item1) or 2) of the preceding paragraph , he shall be entitled to work-related injury insurance benefits in

summarize, generally, the workplace injury and death are of the accidents that derive in the course of or arising out of the work process. The work-related accidents also include commuting accidents, such as the ones related to vehicles on regular route of travel to workplace, home, and the ones involve business trips.

The occupational diseases pose even more serious problems for administrators than do injuries. It may attribute to the both work-related and non-work-related causes of the diseases, also the delayed appearance characteristic of diseases. To handle these problems, China lists the occupational diseases covered by the workers' compensation insurance recognized by the government according to the "List of Occupational Diseases" issued in April 2002 by the Ministry of Health and the Ministry of Labor and Social Security.[91]

Apart from the general scope of workplace injury, death and occupational disease, the special coverage includes the acute illness while on duty and death within the next 48 hours; involved in emergency relief and protecting the public interest; the injured retired armed forces; and rejuvenated wound.

From the negative side, the workers' compensation insurance explicitly excludes the workers who get injured as a result of drunkenness, committing a crime or suicide.[92]

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accordance with the relevant provisions hereof. Where an Employee is in the circumstance of Item 3) of the preceding paragraph, he shall be entitled to work-related injury insurance benefits other than the lump sum disability allowance in accordance with the relevant provisions hereof.

Article 16 An Employee shall not be determined or deemed as having work-related injury if：

1. he is injured or he dies as a result of commission of crime or violation of public security administration；
2. he is injured or he dies as a result of intoxication；

or 3. he inflicts harm on himself or commits suicide.

[91] Author's translation of 卫生部和劳动保障部印发的《职业病目录》。

[92] Article 16 An Employee shall not be determined or deemed as having work-related injury if：

1. he is injured or he dies as a result of commission of crime or violation of public security administration；
2. he is injured or he dies as a result of intoxication；

or 3. he inflicts harm on himself or commits suicide.

D. Insurance Benefits

Major benefits provided under workers' compensation insurance program can be segregated into four categories: a) medical benefits; b) earning-related benefits within medical care duration; c) disability cash benefits; and d) death cash benefits.[93]

Medical benefits covered by the insurance program include all the ordinary medical care, service and payment to cure workplace injury and disease belonging to the types that are covered in the lists issued by the Ministry of Labor and Social Security, the Ministry of Health and other related administrations; medical benefits also cover the food allowance during medical care duration, and rehabilitation benefits to help workers return to work.

Earning-related benefits apply to the workers subjecting to medical care within the maximum period of 24 months.[94] During this time, the employer must provide a worker with 100 percent of his prior earnings monthly.

Disability cash benefits are the most difficult benefits to summarize because of the variety and complexity of the options possible. Disability cash benefits usually include: a) lump sum benefits; b) monthly cash benefits; c) life care benefits. The injured workers must experience an administrative process of judging the degree of disability within 1 to 10 degrees by administrations directed by the provincial governments. The workers whose disability degrees belong to 1 to 4 are the permanent total disable ones; belong to 5 to 6 are the permanent partial disable ones; and 7 to 10 are the temporary partial disable workers. Different type of workers with different degree of disability can recover from different arrangement of the disability cash benefits above. [95]

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[93] Regulation on Workers' Compensation Insurance, Chapter 5, Article 29-37. The English translation of Regulation on Workers' Compensation Insurance virtually is from LawInfoChina (http://www.lawinfochina.com), some changes of the translation are made on author's own understanding.

[94] The ordinary duration of medical care is12 months, it can be extended to 24 months at most.

[95] The summarization of the permanent total disability, permanent partial disability and temporary partial disability refers to Regulation on Workers' Compensation Insurance Article 32,

Permanent total disability benefits which apply to Degree 1 to Degree 4 disabled workers include a lump sum amounting to 18 to 24 months prior wages depending on specified degree of disability; the monthly paid cash benefits that equal to specified percentage of the worker's prior earnings as part of 75% to 90% that vary with the degree of disability; and usually extra 50% of prior wages as life care benefits. If the disabled workers reach the retired age, the pension insurance benefits will replace the monthly paid cash benefits.[96]

Permanent partial disability benefits provide disabled workers who belong to Degree 5 to Degree 6 with lump sum up to 14 to 16 month prior wages according to disability degree; the monthly paid cash benefits that equal to 60% to 70% of prior earnings; and sometimes decided by local administration depending upon the nature of the impairment whether the life care benefits are included or not. If the disabled workers plan to terminate the employment relationship with employers, the other type of lump sum aiming to compensate and help workers to find another job must be paid by the former employers and this part of benefits are not covered by social insurance benefits.[97]

Temporary partial disability benefits only include the lump sum benefits amounting to 6 to 12 month prior wages which are provided to disabled workers belong to Degree 7 to Degree 10 disability. Another lump sum paid by employers aims to compensation and aid workers to continue another work if the disabled workers propose to quit the former job.[98]

Death benefits include a) a funeral expense benefit; b) survivor benefits and c) lump sum benefits.[99]

Workers' compensation insurance program provides the deceased workers funeral expenses up to the specified amount that equals to 6 months of the

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thus corresponding to the categorization of life care disability.

[96] Regulation on Workers' Compensation Insurance , Chapter 5, Article 33.

[97] Regulation on Workers' Compensation Insurance, Chapter 5, Article 34.

[98] Regulation on Workers' Compensation Insurance, Chapter 5, Article 35.

[99] Regulation on Workers' Compensation Insurance, Chapter 5, Article 37.

average monthly wages of former year of the local area where workers had been working.[100]

The insurance program also pays some benefits monthly to designated survivors. These survivors usually include the deceased's spouse and children plus some others such as the parents, grandparents, grand children if they were dependent on the insured workers' earnings before they died from work. The amount of benefits equal to 30% to 40% of deceased's prior wages which vary from their different closed relationships with the deceased. The total amount of the survivor benefits every month should be subject to the maximum of deceased's prior wages. [101]

The lump sum that amounts to 48 to 60 months of the average monthly wages of former year of the local area where deceased employees worked is covered by the workers' compensation insurance program. [102]

E. Program Financing and Administration

The workers' compensation insurance program is a compulsory social insurance program which is actually independent from the social security programs such as pension program, unemployment program in China. Employers are completely responsible for funding the workers' compensation insurance program. The program sets the floating rates of the premiums for different industries. The average rate varies because of differences in the industry mix or regional differences. Within each industry rates vary among employers in accordance with a) their hazard class and b) their individual loss experience relative to the average loss experience in their hazard class.[103]

The workers' compensation insurance program requires insurance institutes

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[100] Regulation on Workers' Compensation Insurance, Chapter 5, Article 37.
[101] Regulation on Workers' Compensation Insurance, Chapter 5, Article 37.
[102] Regulation on Workers' Compensation Insurance, Chapter 5, Article 37.
[103] Regulation on Workers' Compensation Insurance, Chapter 2, Article 8.

or administrations to be set on the local levels within provinces and large cities. These institutes administer the day-to-day program operations. The local insurance institutes in cities are subject upper level of insurance institutes in provinces. The PRC Ministry of Labor and Social Security supervises the provincial insurance institutes.[104]

II. CIVIL LIABILITY OF WORK-RELATED INJURY IN CHINA

An independent tort liability law has not been established in China yet. With the same characteristic as in most continental legal systems, tort liability law is a significant part of civil law, and the legislation of tort is integrated into the PRC General Principles of Civil Law (also GPCL) which was promulgated in 1987.[105]

Workplace injury from the nature of the event, in effect, is the damage of an ordinary citizen's living right or health right, which the citizen is entitled to according to the PRC General Principles of Civil Law Article 98,[106] thereby falling into the jurisdiction of civil law of China. The damage includes pecuniary and non-pecuniary losses that result from other people's tort behavior.

Under Chapter 6 of the PRC General Principles of Civil Law, tort liabilities can be classified into the ordinary tort liability which applies to fault principle as well as the special tort liability with application of strict liabilities. Both the ordinary liability and the special liability exist in varied instances of workplace injuries, deaths and occupational diseases.

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[104] Regulation on Workers' Compensation Insurance, Chapter 1, Article 5.

[105] The tort liability is the Chapter 6 of General Principles of PRC Civil Law currently in effect which was promulgated in 1987. The first draft of PRC Civil Code was published in 2002, but has not been promulgated until now. In this draft of PRC Civil Code, the tort liability law constitutes the Part 8.

[106] General Principles of PRC Civil Law Article 98:"The citizen is entitled to be within the right of living and health."

A. Ordinary Tort Liability Applying Fault Liability

According to Article 106 of The PRC General Principles of Civil Law, "One who through his fault causes bodily injury or damage to the property of another shall bear civil (tort) liability." With regard to the industrial accidents, the fault person mentioned in Article 106 may be an employer, a co-worker employed by the same employer, or a third person. But no matter who this fault person is, he should perform the tort liability for his fault behavior that brings about the negative effect to the property or body of the injured worker. The essential element for judging whether there is tort liability or not should be based on the presence of fault or negligence.

The employer's fault or negligent behavior may directly or indirectly contribute to the damage of the victim. The direct contribution to the damage usually involves the employer's fault. For example, the employer negligently drops the hardware from his hand when he is installing the machine, which leads to damages of the worker who were assisting him. While the case of indirectly caused workplace injury usually involves employer's avoiding his obligations to ensure the safety of working environment, or his failure to provide the safe equipment for the worker, which results in his worker's exposure to the hazardous working conditions and the possibility to get injured on the job. For instance, the employer of a coal mine breaches the safety regulation for not conducting the safety tests to the mine regularly, which leads to the disastrous accidents of coal mine workers.[107] This breach of safety legislation may also involve the administrative or even criminal responsibility of the negligent employer.

Apart from the occasions illustrated above that the employer should bear the tort liability if his fault directly or indirectly causes the industrial accident,

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[107] Coal mine accidents and deaths constitute a substantial part of the total industrial injuries and deaths every year in China. In 2004, percentage of number of coal mine deaths of the total number of industrial deaths in China is about 25%, and 2003 is 22%.

the co-worker or the third person also has to bear the tort liability if the similar causations or other causations occur.

Moreover, the employers' vicarious liability has been included in The Supreme People's Court on Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury (Judicial Interpretation [2003] 20). Article 11 of Judicial Interpretation [2003] 20 provides the injured worker with the entitlement of choices to recover from the employer or co-worker who causes his damage, and offers the employer the subrogation right towards the real tortfeasor. However, Article 11 only applies to the employment which is not covered by the workers' compensation insurance program.

Generally, all the workplace injuries should be under the jurisdiction of the ordinary tort liability with application of the fault principle except the special occasions that apply special tort liabilities which are specifically regulated in the GPCL or other legislation relating to tort liabilities. These special tort liabilities thought by the law makers do not have to be based on the ordinary fault principle because of either the hazardous nature of activities or the stricter responsibility which should be borne by the activists in the reasonable eyes of a person. These special tort liabilities can be considered as the refinement or modification of civil liability system over centuries.

B. Special Tort Liabilities Applying Strict Liability Principle

The third clause of general tort liability in the GPCL provides that "There may be no fault, but if the law stipulates that tort liability should be borne in such cases, the tort liability will be imposed."[108]

To summarize, there are nine types of special tort liabilities which apply the strict principle (also called strict liability), most of which are included in the

[108] GPCL, Chapter 6 Civil Liability, Article 106.

GPCL; a few of them are stipulated by other legislation. They are as follows:

a. Employers' Strict Liability not covered by RWCI.[109]

The employers' strict liability is not specifically included in the special tort liabilities which apply strict principles of PRC General Principles of Civil Law; it has been supplemented in the Judicial Interpretation [2003] 20 Article 11:"The employer should be responsible for the damages suffered by his workers during the process of work;... the relationship between the employer and worker subjected to this article should not be covered by the Regulations on Workers' Compensation Insurance." This means that all the workers not covered by RWCI are entitled by this article to recover from their employers for the damages they suffer from the work regardless of fault. And these eligible workers usually are the independent contractors. The distinction between the employee covered by RWCI and the independent contractor is fuzzy, the principal variable being the degree of control the employer has over the person. Most scholars hold the view that an independent contractor neither signs a labor contract with the employer nor gets salary periodically from the employer, and he has a relatively flexible time schedule of work which is not subjected to the employer's strict supervision. This view of distinction has been adopted by most judiciaries in China.

b. Motor Vehicle Accident Liability

The motor vehicle accident is one of the most often workplace accidents in China. In RWCI, it has been defined as the commuting workplace accident that is covered by the social insurance. Moreover, within the framework of tort liability law, some of the occasions concerning the work-connected injury belong to the strict liability.

The PRC Road Traffic Safety Law Article 76: "If a moving motor vehicle

[109] RWCI, Regulations on Workers' Compensation Insurance.

strikes a non motorized vehicle or a pedestrian and causes harm, and the above motor vehicle is a party of the compulsory third-part liability insurance plan, the insurance company, within the limits of insurance, shall pay compensation; Responsibility of loss in excess of the amount of insurance is borne by the owner of the motor vehicle, but if it can be shown that vehicle operator has exhausted safety measures, the responsibility to pay compensation to the damage can be reduced even avoided if there is proof that the damage is caused by the intent of the owner of the non motorized vehicle or the pedestrian."

From the provision above, it is specifically illustrated that the tort liability in excess of the amount of compulsory third-party insurance applies the strict liability principle for the owner of the motor vehicle. Apart from that, the equity-based liability principle is also applied.

Although the third-party motor vehicle insurance is a compulsory insurance in China, the occasions of no attendance of third-party motor vehicle insurance do exist.[110]As to the owner of vehicle motor who does not have the mandatory insurance, there is no specific provision about the tort liability. However, the Article 76 usually can be referred to by the most judiciaries in dealing with the collision cases of a motor vehicle and a non motorized vehicle or a pedestrian.

Apart from the strict tort liabilities above, the special tort liabilities that illustrated by a few articles of the GPCL are possible to be referred to on the occasions of workplace injuries. And they are:

c. Environmental Pollution Liability

Article 124 of GPCL writes that: "If environmental pollution causes harm to another person because of the breach of the related environmental protection legislations, one shall bear the tort liability." And Article 43 of 2000 PRC Ocean Environmental Pollution Protection Law, Article 41 of 2008 PRC Prevention and

[110] Article 17 of PRC Road Traffic Safety Law:"China has conducted the compulsory third-party motor vehicle insurance, and set up a social funding of motor vehicle accidents."

Governance of Water Pollution Law and Article 37 of 2000 PRC Prevention and Governance of Atmosphere Pollution Law allow the only defense of the strict liability is force majeure.

Concerning this strict liability, the workplace injury occasion involved might be that, for instance, factory A has been releasing some toxic gas while its regular producing process for a long time, which makes the workers of adjacent factory B who have been working under such toxic environment subjected to occupational diseases finally, and factory A should bear the environmental liability.

d. Product Liability

Article 122 of the GPCL says: "If a defect in the quality of a product causes harm of the body or property of another, the manufacturer and seller of this product shall bear the tort liability." And Article 41 of 2000 PRC Product Quality Law (PQL) limits the defenses of the product liability into three situations: a) the product has not been put into circulation; b) when the product was placed into circulation, the injury-causing defect did not exist; c) at the time when the product was placed in circulation, the science and technology was such that one could not discover the defect. The combination of Article 122 of GPCL and Article 41 of PQL means that without the provisional defenses, the manufacturer and seller of the product must compensate for the damages of the victim.

Obviously, when the victim is a worker who is using such a product as the tool during work process, the strict product liability will be applied when the injured worker recovers tort compensation from the manufacturer and seller.

e. Liability for Extra-Hazardous Activity

Article 123 of the GPCL writes that: "If one injures another by engaging in activity involving work at a height, high voltage, highly combustible materials, explosives, radiation, or the like which is highly dangerous to the surroundings,

he shall bear tort liability. But if it can be proven that the damage is due to the victim's intentional act or is caused by force majeure, tort liability shall not be imposed." According to this article, when the victim of such extra-hazardous activities is worker who might be co-working in the same work site, or might be on his way to and from work, for example, the tortfeasor or torfeasor's employer shall compensate the injured worker for his full damages if they fail to prove the provisional defenses successfully.

f. Liability of Construction Site

Article 125 of the GPCL regulates that: "If one causes damage of another while he is digging holes, fixing or installing machines under the grounds of a public place, on sides of the road, or on the channels, and he neither set up some obvious signs to aware passengers nor took safety measures to prevent accidents, he shall bear tort liability for the victim." Similar to the liability for ultra-hazardous activity, if the victim of mistakes on a construction site coincidently is a worker who commutes to work, then except for the legal defenses, he is entitled to recover from such tort claim regarding to the strict liability principle.

g. Liability for Damages Caused by Animals

Article 127 of the GPCL says that: "If a domesticated animal causes harm to someone, the animal's keeper or manager shall bear tort liability, except that the keeper or manager can show that the damage is due to the victim's fault, or if due to a third person's fault which causes injury, the third person shall bear tort liability." The work-connected injury can involve such strict tort liability, for instance, an animal bites a worker who is conducting his job.

h. Liability for Damages Caused by Objects

Article 126 of the GPCL regulates that:" If a building or any other installation, or any fixture or hanging things collapses, comes loose, or falls down, causing injury to another, its owner or manager shall bear tort liability,

unless he can show himself to be without fault." In reality, such accidents often happen and occasionally concern work-related injuries or deaths.

i. Liability for Guardians

Article 133 of the GPCL stipulates the strict liability of the guardians of persons without the legal capacity, or with limited legal capacity, if such persons injure somebody, except that the guardians successfully prove that they have exhausted the guarding obligations.

This article is not placed into the special tort liabilities applying strict principle, but most tort scholars hold the view that it is a strict liability for guardians. Therefore, if the person who causes the on-the-job injury or death should be under guarding, and the guardian does not have the legal defense, then the injured worker or the dependents of the deceased is entitled to recover the tort claim through such strict liability for guardians.

C. Compensation for Tort

Generally, the compensation for tort litigation should be segregated into the pecuniary compensation and the non-pecuniary compensation (spiritual compensation). Theoretically, the compensation should take the form of lump sum, it is also allowed to be paid periodically if the tortfeasor has difficulty to pay all compensation at once.[111]

III. ANALYSIS OF STATUTES RELATING TO WORKERS' COMPENSATION IN CHINA

As discussed above, the tort liability and workers' compensation insurance

[111] For thehe concrete legal provisions of compensation standard and content, see Table Table 5-2. Workers' Compensation Insurance Benefit and Tort Compensation Standards Comparison..

program are so distinct in compensation basis that on most occasions people never link these remedies together, but when it comes to the tort liability existing in workers' compensation, the irrelevant remedies thereby having overlaps in dealing with workplace injuries.

Given that the number of workplace injuries and diseases is soaring every year, Chinese legal institutions, labor administrations and other organizations by no way can escape the issue of dealing with the relationship between tort claim and workers' compensation insurance within workers' compensation system. Then there are many theoretical as well as practical questions that need to be answered. For instance, can the co-existence of tort liability and workers' compensation insurance possible in the domain of compensation of work-connected injury? If not, can injured workers choose either one at their wills? If yes, how do these remedies operate within workers' compensation system? Which one should play the dominant role? Can injured workers get double compensations? If they can not, then what is a better method to calculate the compensation they can get from both remedies? Will the answer vary in accordance with different types of workplace injury? Few of the old legislation and new ones at national level concerning tort liability and workers' compensation insurance have clear definitions of the relationship between two remedies, which contributes to the discriminatory answers to the practical questions above. Therefore, it is necessary to highlight the related legislation in China, together with views towards the structures of workers' compensation system among academia and practical arena.

In this section, the statutes at the national level and local level concerning the relationship between two remedies in workplace accidents and diseases will be discussed and summarized, accompanied by different academic voices. All the discussions and examinations in this section are to contribute to the endeavor of the depiction of an overall picture of the relationship between tort liability and workers' compensation insurance within workers' compensation system in the

legislation of the PRC.

The legislation and related interpretations having statutory effects with regard to the relationship between two remedies will be discussed in the sequence of time and from the national to the local. Academic views and judicial interpretations will also be discussed for a deeper understanding of these issues.

A. Workers' Compensation Social Insurance Regulations

a. Old Workers' Compensation Regulations

In this regard, Article 43 of The PRC Road Traffic Accident Dealing Methods promulgated in 1991 has provided for the relationship between the two compensation remedies when it comes to the overlaps of the workplace injuries resulting from road traffic accidents. The Article reads: "if the worker's death or disability without working capacity is the result of a road traffic accident, after complying with the dealing methods of this law, the worker should also be entitled to the allowance, workers' compensation insurance benefits from his employer according to other related regulations." Judging from this article, one can come to the conclusion that the workers suffering from road traffic accidents relating to employment should deserve double recoveries from both remedies owing to the vague specification of adjustment.

Article 28 of The Provisional Provisions on Workers' Compensation Insurance for Enterprise Employees (PPWCIEE) promulgated by the Ministry of Labor in 1996, however, made more specific regulations as follows: "with regard to the workplace injuries resulting from road traffic accidents, it should be dealt with in terms of The PRC Road Traffic Accident Dealing Methods and other related regulations; as to the workers' compensation insurance part, a) the payment for medical care, funeral expense, life care, auxiliary equipment for

disability and earning capacity which has been included in the compensation from tort claim of the road traffic accident should not be repeatedly paid in social insurance benefits, and the prepaid expenses if there is any, should be returned to social insurance administration; b) the death allowance or disability allowance has been paid to the injured worker or his survivor in compensation from tort claim, the lump sum for deceased or disabled will not be paid twice. But the inadequate amount that tort compensation compared to social insurance benefits should be supplemented by workers' compensation insurance administration; c) the expense apart from the overlapping ones mentioned in a) and b) should be paid to injured worker or his survivor by social insurance administration; d) if the injured worker cannot recover from tort claim due to the absence of defendant or other reasons, he is entitled to the total amount of workers' compensation social insurance benefits according to this law; e) employer or social insurance administration is obliged to help injured worker to recover from the defendant of tort claim, and can prepaid some medical care expense or other allowance, if there is need."[112]

A further step was taken by The Reply of Ministry of Labor to< Request of the Issues Concerning Workplace Injury Determination Issues> (Labor Decree [1997]51) by Ministry of Labor in 1997. Clause 4 of Reply extended Article 28 in 1996 PPWCIEE from road traffic tort claim to all other tort claim compensation as it said: "apart from road traffic accident, workplace injury referring to other tort claim compensation, the relationship of compensation from the two channels should comply with Article 28 of 1996 PPWCIEE."

The old national laws gave social insurance administrations and judiciaries a relatively clear clue to dealing with the relationship between private and public remedies towards workplace injury and disease in China. Under the 1996 PPWCIEE, the interaction between the two compensation systems is mostly

[112] Provisional Provisions on Workers' Compensation Insurance for Enterprise Employees (Labor Decree [1996] NO. 266, PPWCIEE) Article 28.

interpreted as the model that tort remedy comes first, the supplementary remedy should be the workers' compensation social insurance benefits on ordinary work-related injury occasions. Only under the particular situations where injured workers are incapable of recovering from tort claims, workers' compensation social insurance can play dominant role. As to the amount of compensation covered by a tort liability claim, the same compensation type cannot be paid twice by social insurance. Therefore, the general relationship between tort liability and social insurance concerning work-related injury before the 1996 PPWCIEE which was out of effect now naturally appeared to be that tort liability was of greater importance than workers' compensation insurance program which only served supplementary function both in compensation sequence and compensation amount.

Followed by some local regulations such as Guangdong Province Ordinance of Workers' Compensation in 1998 and Jiangsu Province Regulations of Township Enterprise Employee's Compensation in 1999, the supplementary method in compensations from both remedies has been adopted by most local areas in dealing with the compensation relationship in work-related injury cases. However, the concrete compensating method varied in accordance with local economic development and other situations among different local areas of China.[113]

With the promulgation of PRC Regulation on Workers' Compensation Insurance in 2004, the 1996 PPWCIEE was abolished. Moreover, the 1991 PRC Road Traffic Accident Dealing Methods was also replaced by The PRC Road Traffic Safety Law (RTSL 2004) and the Enforcement Ordinance of RTSL which

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[113] Article 33 of Guangdong Province Ordinance of Workers' Compensation:"As to the workplace accidents that refer to the tort liability claim thereby relating to tort compensation or commercial insurance, the compensation consequence should be first tort compensation or private insurance, second workers' compensation social insurance; apart from the funeral expense and medical care payment which should not be repeatedly paid, other expenses should be covered in social insurance benefits." Judging from this article, the compensation standard is much higher than that of 1996 PPIEWCI.

And the Jiangsu Province Regulations of Township Enterprise Employee's Compensation in 1999 was abolished due to the new Jiangsu Province Enforcement Regulations of RWCI.

came into effect from 2004. However, owing to the absence of provisions concerning the relationship of the two remedies in new laws, some provisions of the old ones are still being referred to by some local courts or labor administrations in dealing with work-connected injuries. Therefore, the old laws of workers' compensation has made some far reaching influence on dealing with such problems in workers' compensation areas than the newly promulgated laws which show inadequacy or even no provisions with regard to similar problems.

b. Current Local Workers' Compensation Regulations

The 2004 PRC RWCI is considered as the successive legislation of 1996 PRC PPWCIEE to take charge of the social insurance issues at national level under all occasions that could happen in the areas of workplace injury, death and occupational disease. Disappointingly, the provisions covering the relationship between tort liability and social insurance turn out to be absent in the PRC RWCI, which leads to the overall confusion among local social insurance administrations and judicial institutions.

Fortunately, this inadequacy of national legislation has been more or less redressed by the traditional enforcement regulations of some local provinces and areas, but it still cannot escape from the negative effect resulting from the ambiguity of such relationship in the national workers' compensation laws, which appears to be the diversified adoption in different areas upon their own construction of the national laws and other unique situations. Generally, the diversification of local workers' compensation enforcement regulations of China focusing on the relationship between tort liability and social insurance can be divided into the following categories.

Most of the local workers' compensation enforcement regulations still follow the model set by the 1996 PRC PPWCIEE, which appears to be that tort compensation comes first, supplemented with workers' compensation insurance

under the occasions of workplace injuries caused by road traffic accidents or other third parties. Moreover, among these local areas, the concrete provisions differ from each other in details. Some provinces have copied the whole Article 28 from 1996 PRC PPWCIEE without any modification. For example, Article 20 of Yunnan Province's workers' compensation enforcement regulation and Article 27 of Zhejiang Province's regulation replicated the whole Article 28. Some provinces or areas have enacted general provisions in their regulations instead of copying the old ones. However, these general provisions reflecting the vague supplementation method without detailed instructions cannot serve the function of guidance for injured workers and other institutions involved in workplace injury cases. For example, Article 39 of Hubei Province's Enforcement Regulation of Workers' Compensation Insurance provides: "the work-connected injuries caused by accidents on road, shipping, aviation, and railway, or injuries resulting from work dispatching out of border, or concerning other third-party tort liabilities, are entitled to get tort compensation according to related provisions; if the tort compensation is less than social insurance benefits, workers' compensation administration should grant certain amount of supplementation." Article 10 of Sichuan Province's enforcement regulation provides: "as to the injury occasions of motor vehicle accidents on the way to or from work, or in the course of or arising out of work which are identified as workplace injuries, if the tort compensation has reached the amount of workers' compensation insurance standards, there is no social insurance granted; if lower, supplemented workers' compensation insurance is allowed." Similar provisions can be found in the enforcement regulations of Inner Mongolia Autonomous Region, Tianjin and Xi'an. Apart from such provision, some areas allow workers' compensation social insurance benefits to be prepaid to injured workers, and the benefits should be returned after they get tort compensation. But there is no provision to regulate specific calculation measures of the returning. Take Shanghai for instance, Article 44 of Shanghai Enforcement Regulation of Workers' Compensation Insurance: "workplace injuries resulting from motor

vehicle accidents or other third-party caused accidents, if the social insurance benefits are prepaid to injured workers, once tort compensation is paid, the injured workers or their dependents should return social insurance benefits of certain amount." Similarly, Wuhan also follows the same pattern without instructing the concrete calculation method of returned social insurance benefits. Exceptionally, few areas endeavor to set the calculating standards such as Shanxi Province's enforcement regulation Article 23 regulating that the returned amount of social insurance benefits should be calculated according to the method of "comparing benefit types, accumulating amount of separate compensation type, and comparing total amount of benefit."

Different from the model that 1996 PRC PPWCIEE has provided and most local areas followed, individual areas have made some special provisions. For example, Article 37 of Xiamen's enforcement regulation provides, "under the conditions of work-related injuries owing to third parities' tort liabilities, if the injured workers have already get tort compensation, the workers' compensation social insurance benefits should not be repeatedly granted." [114] This simple provision can be construed by people as no compulsory sequence of tort compensation weighing out of social insurance with respect to dealing with the relationship between tort liability and social insurance. However, the over-simple provisions are also easy to get people and institutions involved in workplace injuries confused.

Some local regulations of workers' compensation insurance follow the same pattern as the new 2004 PRC RWCI, which shows blank in the regard of relationship between two remedies in workers' compensation system. This absence of regulation of course in no way does favor to the problems encountered under such occasions. The concrete judicial decisions and social insurance granted by labor administrations in these local areas become

[114] Xia'men Enforcement Measure of the Regulation on Workers' Compensation Insurance, Article 37.

extremely difficult to explore owing to the inadequacy of related regulations. However, one thing is for sure that the compensation outcomes of the workplace injuries in these areas must vary a lot among different domains and among different judicial institutions because of the uncertainty of interpretations from different points of view. These areas include Fujian Province, and the city of Chongqing.

The previous discussion of old and current workers' compensation legislation has shown that the provisions for dealing with the relationship between tort compensation and social insurance benefits in workplace injuries among different local areas of China could take many forms. Basically, most workers' compensation insurance laws follow the same pattern of old laws that in third party caused workplace injuries, tort compensation plays dominant role in the total compensation of injured workers, which is supplemented by workers' compensation social insurance benefits. The reason for this mainly lies in the fact that new national workers' compensation law omits such provisions that local enforcement regulations are forced to trace back to the old ones to explore solutions despite the fact that the old laws are replaced by the new ones. Furthermore, the local enforcement regulations with regard to the arrangement of two remedies in workers' compensation system today are far from satisfactory. They have no clear guidance provisions of how to operate two compensation channels in practical details, such as the specific calculation method, the concrete circumstances supplementing model employed, which weakens the authority of such provisions to an extremely large extent.

Moreover, the operations of two compensation remedies that prevail in most of current local workers' compensation regulations, in fact, deprive most injured workers of the entitlements of getting social insurance benefit in the workplace injury cases caused by third parties. The reason can be traced to the considerable difference in the fundamental compensation standards of tort

liability and social insurance entitled in China,[115] which reveals the substantially higher standard and larger amount of compensation from tort liability claim over workers' compensation insurance benefits. The important difference of compensation amount leads to the fact that injured workers can recover from tort claims much more than from workers' compensation insurance in most cases; therefore, avoids the social insurance program from supplementing tort compensation in terms of the compensation model employed in most local areas at present in compliance with the 1996 PRC PPWCIEE.

B. Civil Law Interpretations

Concerning the interpretation of the civil law provisions, the most significant provision with regard to the relationship between tort liability and social insurance in workers' injury is Article 12 of the Interpretation of the Supreme People's Court on Some Issues concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury.[116] (Judicial Interpretation [2003]20). This provision is most frequently referred to in dealing with the personal injury cases involving work-connected accidents by many local courts as well as other judicial institutions and academic scholars concerning this issue. According to the structure of Article 12, two clauses can be discussed separately due to the distinctive circumstances to which each separate clause applies.

a. Clause 1 of Article 12

Clause 1 of Article 12 provides that "where a worker of an employer who has required by law the responsibility to contribute to the workers' compensation social insurance program, suffers from a personal injury due to a work-related

[115] An abbreviated comparison of the workers' compensation insurance benefit and tort liability compensation standards according to related provisions will be presented in Chapter 5.
[116] Below briefly called The Supreme People's Court Interpretation or Judicial Interpretation [2003]20.

injury accident, and the worker or his close relatives brings a lawsuit to the people's court claiming against the employer for bearing civil compensation liabilities, he shall be informed to handle the matter in accordance with the 'Regulation on Workers' Compensation Insurance;' ". Two conclusions can be drawn from this clause at the first sight. Firstly, in the common cases of workplace injury, the injured worker can recover from the workers' compensation social insurance administration according to the RWCI. Secondly, under the circumstances where the employer has escaped the contribution responsibility of workers' compenstion insurance for its worker, the injured worker still can get compensation from his employer which equals to the amount of social insurance standards in accordance with RWCI. However, it is not clear whether, after the injured worker has recovered from social insurance, he has the right to file a civil tort claim against the negligent employer who caused his suffering. No definitive answer can be found in Clause 1 of Article 12.

Most practitioners and academic scholars construe Clause 1 as the relieving model that the victim on the job has no civil tort claim right against his employer under the circumstances mentioned, although many of them do not agree with the reasoning of this provision. For example, Judge Chen Xianjie, who participated in the drafting of this Interpretation, believes that within the liability of employers in the work-related injury cases, the tort compensation should be replaced thouroughly by workers' compensation social insurance.[117] However, Judge Hu Shihao, another member of the drafting committee of the Interpretation believes that due to the disagreement of views towards the relationship between tort liability and social insurance in workplace injury cases, and the nature of labor dispute of workplace injury, the Interpretation of civil law is not able to supply more explanations of this issue temporarily and ready to

[117] See Chen Xianjie, Several theories and practical issues of the Interpretation of the Supreme People's Court on Some Issues concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury, Law and Application, 2004 (2), p8.

leave more space of interpretations to others.[118] Overall, according to Clause 1 of Article 12, in the workplace injury cases caused by accidents, intent or negligence of employers, victims only can get social insurance benefits from the workers' compensation insurance program.

b. Clause 2 of Article 12

Clause 2 of Article 12 provides that "where a worker suffers from a personal injury due to the tort of a third person other than the employer, and the worker files a tort claim against the third person for bearing the civil compensation liabilities, the people's court shall support such claim." This clause has recognized the claim right of injured worker when his injury is owing to a third person. The controversial points lie in this clause are whether the victim can also get social insurance benefits from workers' compensation program without any deduction of amount and what is the order of two compensation remedies. There are diversified answers and understandings towards the controversial issues.

Judge Hu Shihao from Supreme People's Court predicts the possibility of getting double recovery in this type of workplace injury cases. He figures that owing to the parallel relationship between tort liability of third party and workers' compensation insurance, from doctrinal stand point, the victim may obtain double recovery.[119] But some scholars hold the different view that it can be construed as the Cumulating Model or Electing Model because of the ambiguous words of Clause 2. For example, Professor Zhang Xinbao believes that it should be considered as the Electing Model that the injured worker is free to choose the social insurance or tort claim against the third party, because it would be extremely unfair for the injured worker whose injury is caused by

[118] See Understanding and Application of the Interpretation of the Supreme People's Court on Some Issues concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury, People's Court Publishing House, 2004, p201.
[119] See Understanding and Application of the Interpretation of the Supreme People's Court on Some Issues concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury, People's Court Publishing House, 2004, p201.

workplace incidents or employers, if another worker can get both compensations only due to that his suffering is brought by a third person.[120] Moreover, some people considered this clause as the Supplementing Model built on the unreasonable theoretical basis of double recovery. Apart from the compensation model Clause 2 conveys, another controversy comes from the compensation order of these remedies, which has not been reflected in Clause 2 at all.

In summary, within the limitation of Article 12 of The Supreme People's Court Interpretation, the direct way to civil compensation is blocked for injured workers who get damaged owing to their employers, which is facing challenges of many scholars; and for the workplace injuries caused by third party, there is no unified understanding about the issues such as how to calculate the total amount of compensation from two different remedies, which remedy should come first, whether the double recovery is allowed and so on. There is still considerable space of further specification of the relationship between tort liability and social insurance for judicial institutions to clarify in other related civil law interpretations in the future.

C. Special Laws

There are mainly two special laws in which the provisions concerning the relationship between two compensation channels of workplace injuries can be found. Article 48 of The PRC Production Safety Law provides that "the employees who suffered injuries in production safety accidents shall be entitled to claim compensations against their employers concerned if, according to the civil law, they have the right to do so apart from recovering from workers' compensation social insurance according to RWCI." Another provision is Article 52 of the PRC Occupational Disease Prevention Law which provides that "apart

[120] See Zhang Xinbao, 工伤保险赔偿请求权与普通人身损害赔偿请求权的关系, The Relationship between Workers' Compensation Insurance and Ordinary Personal Injury Compensation, China Laws, 2007(2).

from the social security remedy for the work-related injuries, the occupational disease victim who is entitled to compensation according to applicable civil laws can claim for compensation from the employer."

Both of the provisions above recognize the entitlements of injured workers to recover from both tort liability and social security under the circumstances concerned in the separate provisions. Disappointingly, it is the same as the inadequacy lying in Article 12 of the Interpretation that no specific calculation or deduction method of the total amount of compensation from each remedy allowed to recover, if any, is clarified in the special provisions above. And the divergence of academic interpretations towards the special provisions mainly lies in whether double recovery of both remedies is allowed. Some people hold that the deduction of the same compensation type should be enforced due to the irrationality of the unlawful windfall; while some figure that if the provisions do not forbid the double recovery explicitly, there is no need for the deduction. As the result of such disagreement in understanding, the results of workplace injury cases in practice vary considerably owing to the adoption of different views in different local courts and labor administrations.

Notwithstanding, there are substantial conflicts between the special provisions and Article 12. The condition for victims on the job to get access to tort compensation apart from social insurance in both Article 48 of The PRC Production Safety Law and Article 52 of The PRC Occupational Disease Prevention Law is that the tort exists in the incidents which lead to the injured worker's suffering according to the fault principle of civil law. In another word, if the victim's physical damage is caused directly or indirectly by the employer's fault or negligence, he is also entitled to file a tort claim against the employer for compensation according to the special provisions. However, this situation of employer's intent or negligent tort has been excluded from the availabilities to tort claim in Clause 1 of Article 12 of the Judicial Interpretation [2003] 20. Some scholars in discussing The Supreme People's Court Interpretation suggest that

the "tort compensation" allowed in special provisions above should be restricted to non-pecuniary compensation only, while others do not support such restricted interpretation only if the repeated compensation is avoided.[121] If either suggestion is taken, it equals to the recognition of the possibility of getting compensation from tort claim under certain situations concerning the production safety accidents or occupational disease involving employers because the negligence of employers is a highly possible factor in the formation of workplace accidents and occupational diseases in China nowadays. Therefore, the absolute exclusion of tort remedy for victims on the job from the workplace injuries caused by employers may not be the only choice of reasonable interpretation of Clause 1 of Article 12 of the Judicial Interpretation [2003] 20.

To sum up through specific analysis above of the main legislations at national and local levels concerning the relationship between tort liability and social insurance with respect to workplace injuries, a general picture should be clear and a few conclusions can be made. First, the issue of the inter-relationship between two remedies in workplace injury has not drawn enough attention from legislative institutions at present in China. This can be traced in the inadequacy or even absence of provisions in this regard in the most authoritative laws such as the PRC RWCI. Secondly, the current legislation in this area tends to be incomplete and lack of concrete details to underpin the enforcement, such as Article 12 of the Judicial Interpretation [2003] 20. Moreover, some provisions in different laws sometimes contradict with each other to the extent that it makes it even more difficult to clarify the relationship between tort liability and social security in work-related injury cases. All the inadequacies and disaccord of current legislation in China will lead to many different and incompatible interpretations from academic arena, thereby resulting in varying practices in the courts and labor administrations among different local areas within China.

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[121] Liu Haihong, Analysis of the Application Relationship between Workplace Injury Insurance and Civil Compensation, Shandong Justice, Vol. 185, p101.

IV. PROBLEMS CONCERNING PRACTICES OF WORKPLACE INJURY CASES

A specific and critical review has been conducted of the legislation and interpretations relating to the relationship between tort liability and social insurance in the above section. It must be noted that the most substantial inadequacy of the legislation and interpretations which have been discussed above is the lack of clarification of the application rules of workers' compensation social insurance program and tort claim in the domain of work-connected injury, death and occupational disease. However, the legislative aspect can only reflect a part of the overall situation of workers' compensation system in China.

Hence, in order to give a more complete picture of Chinese law and practice concerning the relationship between two remedies in workers' compensation system, and in order to solve the problems stemming from the inadequacy of legislation more effectively, some grounding work of workplace injury cases in practical phase are required. Due to the problems of legislation, in practice, a number of problems reflected in the process of cases related to work-connected injury and occupational disease can be found.

In this section, the author will summarize the main problems resulting from the inadequacy of legislations, and discuss selected representative cases and empirical data from legal practice to illustrate some of these problems concerning the relationship between two compensation channels within workers' compensation system of China.

A. Unfair Protection

With respect to the lack of clarification of application rules of compensation systems in national legislation and interpretations of China, local people's courts and labor administrations have to promulgate related enforcement regulations of national workers' compensation laws and other interpretations. However, the provisions concerning the relationship between social insurance and tort liability in these local areas appear to be diversified owing to different construction and dependence of local legal and economic situations. Therefore, the non-unification of practices of workplace injury cases directly leads to the unfair protection which is mainly reflected in the disparity of compensation amounts received from different compensation systems in China. The unfair protection by workers' compensation laws varies from types of workplace injuries, as well as in accordance with local workers' compensation enforcement regulations.

a. Workplace Injury Caused by Motor Vehicle vs. Other Workplace Injury Caused by Third Party

Work-connected injuries and deaths vary in accordance with different criteria of division. Causation usually is considered as the most frequently adopted criterion to divide workplace injuries and occupational diseases. Notwithstanding lack of related statistics, a substantially large percentage of workplace injuries and deaths are caused by the third party with either intent or negligence. Usually, the victims confront the dilemma of choosing between different remedies (or both of them) owing to the lack of related legislation and diverged interpretations.

Motor vehicle accident is the direct product of modern industrialized society. The data of PRC Ministry of Public Security states that approximately 265,204 cases of road traffic accidents were recognized or diagnosed by related administrations in 2008. The death rate per 10,000 motor vehicles was 4.3.

Although the data about the percentage of road traffic accidents involving the way to or from work is unfortunately not given and is hard to find, the rate of workplace injuries and deaths caused by road traffic accidents can be estimated to be very high in the total number of workplace injury cases in China. For the workers who are working for the industries of lower risk, the motor vehicle accident is the most significant factor in the formation of their workplace injuries; while for the workers who perform jobs with high risks, the vehicle accident is considered as one of the most important factors leading to workplace injuries and deaths.

However, similar workplace injury cases involving the third party lead to different results of compensation only because one results from motor vehicle accidents, the other does not. Such unfair results can be traced in many local areas of China, and below are two cases in Beijing.

Case 3-1

Zhang comes from Henan Province, and is now working in a restaurant in Beijing. On the night of April 26, 2008, when Zhang was on the road back home on his bicycle, a car suddenly crashed on him from the behind and Zhang was thrown to approximately ten meters away with his bicycle. Right after the accident, the driver of the car, Mr. Wang, called an ambulance to take injured Zhang to hospital. Traffic police investigated the accident scene, and concluded that the causation of the crash was Wang's drunk driving, and Wang should take the entire responsibility.

According to Article 12 of the Beijing High People's Court Suggestions of Some Issues Concerning Trial of Workplace Injury Administrative Cases (Beijing High 2007[112]),” with regard to the

workplace injury caused by motor vehicle accidents, it should comply with the PRC Road Traffic Safety Law and other laws and regulations for tort compensation at first. If the medical expenses, care of living expenses, expenses for instrument of disability, capacity of earning and funeral expenses have been included in the tort compensation, the social insurance administration will not provide such benefits." The lawyer of Zhang filed a tort claim against Wang and the motor vehicle insurance company for RMB 40,000 to redress the damage brought by Wang's negligent behavior.

On July 17, the District People's Court made the decision to support the claim of Zhang's lawyer. Zhang received RMB 36,800 from tort compensation system. When he decided to recover from workers' compensation social insurance program, he was informed, however, that he was not allowed to get access to social insurance system due to Article 12 of Beijing High 2007[112]. This means that Zhang's bodily damage on the job can only recover from tort liability system, but the victim is barred from any claim for compensation from social insurance system. Finally, the actual compensation Zhang got was only RMB 36,800 for his bone fracture, injured head and legs on the way from work.

Case 3-2

36 years old Wen came to Beijing with his family to work as a security guard of a restaurant in 1996. Until 2005, it had been 9 years since he first came to make a living, and his salary increased gradually from RMB 400 to RMB 1,000 per month. His ordinary life ends on March 21 2005 when a stranger out of control cut Wen's left arm with a sharpened knife during Wen's duty hours. His left arm was diagnosed by the doctor as totally corrupt, which meant that Wen's left arm became permanently disabled and he would lose his job forever.

Since the criminal ran away, Wen had to resort to social insurance system for workers' compensation. Owing to the lack of a lawful labor contract between Wen and his employer, the process of getting workplace injury insurance benefits became more complicated and difficult. From June of 2005 to May of 2006, having gone through the processes of two mediations, one workplace injury determination, one authentication, one administrative review, Wen received permanent disability benefits amounting to RMB 130,000 from workers' compensation social insurance program.

Fortunately, the criminal was also caught by police, and Wen's lawyer immediately filed a civil suit collateral to criminal proceeding against the criminal according to Article 12 of the Interpretation of the Supreme People's Court on Some Issues concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury (Judicial Interpretation 2003[20]). Finally, after two suits within one year, on 22 August 2007, Wen recovered RMB 80,000 as compensation from the tort system.

Wen, who recovered from two different remedies within broader workers' compensation system, to some extent, was a very lucky victim on the job, compared with other injured workers who even have no access to the basic social insurance benefits. But he obtained these benefits at the price of spending two years and a half for that purpose.

As presented in the two selected cases above, clearly, people may likely to wonder why the victims in similar cases of workplace injury involving the third party got totally different compensation from workers' compensation system of Beijing. It is obviously unfair only because Zhang's damage on the job was caused by motor vehicle accident. However, this unfair phenomenon exists in many local areas due to the unreasonable or non-clarified provisions in workers' compensation laws.

b. Similar Workplace Injuries Cases Get Different Results according to Different Local Regulations

Lack of clarification of application rules of tort liability system and social insurance system within broader workers' compensation system leads to non-unification of adoptions in the provisions of different local enforcement regulations.

Case 3-3

Chen was employed by a hotel in Xiamen in 1998. On June 17, 2004, when Chen was on the way to work in his car, a truck in front of him on the other side of road suddenly fell out of road, and crashed down upon Chen's car. After medical authentication of the designated hospital, he was diagnosed as belonging to the permanent partial disability Degree 6 of workplace injury. Through tort claim against the truck driver who was totally responsible for Chen's damage, Chen received compensation for medical expenses of RMB 34,000.

In 2006, Chen was ready to get back to work, but he was arranged to another job in the same hotel owing to his injury which he didn't want to accept. Since then, Chen went to Xiamen Labor Arbitration Commission to claim for compensation approximately amounting to RMB 15,000 against his employer according to Article 60 of PRC RWCI which provides, "with regard to the workers who should attend social insurance program, but not attend owing to employers' avoiding of contribution of workers' compensation insurance, employers should pay for all the expenses according to the standards of this regulation." However, the hotel refused to pay with the defense that Chen had already received compensation from tort claim against the driver, thereby abandoning the right to recover the same compensation type from the hotel.

After trials from District People's Court to Xiamen Intermediate People's Court, Chen's claim finally did not win any support according to Article 37 of Xiamen Enforcement of Workers' Compensation Insurance Regulation, which states that "with respect to the work-connected injury caused by the third party, if the wrongdoer has paid medical expenses through tort claim, workers' compensation social insurance benefits will not pay the same expenses."

Case 3-4

Fu was working in a truck service company in Beijing. On April 3, 2008, Fu was in charge of driving a truck full of cargo to suburb of Beijing. On the highway, Fu's truck had a crash with another car, and Fu was badly injured while the driver of the car was dead. Fu was taken to the hospital nearby. The hospital judged Fu as permanent total disability Degree 1 which means that he would lose the capacity of living by himself.

Fu's lawyer filed tort claim against dead driver's motor vehicle insurance compensation for RMB 150,400. After trial, the court almost supported plaintiff's claim.

When Fu was hesitating whether to apply workplace injury benefits, his lawyer suggested him taking a shot. Finally, Beijing Labor Bureau allowed Fu to recover from workers' compensation social insurance program and awarded him RMB 12,450 in accordance with Article 13 in the Suggestions on Some Issues of Workplace Injury Insurance promulgated by Beijing Labor Bureau (Beijing Labor Social Security 2008[86]), which states that "with regard to the injury resulting from motor vehicle accidents happening after November 9, 2007, if the injury belongs to work connected through authentication of related labor security administrative institutions, the victim is entitled to

recover from the social insurance benefits listed in the regulations."

The two cases presented above happened in two different cities in China. Due to the lack of unification of rules in national workers' compensation laws and interpretations, the local enforcements vary. And this leads to that amounts of the compensations received by two victims above differ a lot.

One may argue that it is justified that different local areas prefer to different compensation policy making of the relationship between tort liability and social insurance depending on the economic and legal situations of their own. However, having reviewed the four cases selected above, one may find that even two similar workplace injury cases happened in the same area (Case 3-1 and Case 3-4 both in Beijing), can lead to totally different compensation results. In Case 1, Zhang failed to get workers' compensation insurance award apart from tort compensation according to Article 12 of Beijing High 2007[112]; while Fu succeeded in getting both compensations from social security system and tort system according to Article 13 of Beijing Labor Social Security 2008[86].

Hence, it must be noted that currently there are conflicts between the judicial interpretations and regulations issued by labor administrations in Beijing concerning the relationship between tort liability and social insurance in practice. And this could be solved by nationalizing clear rules concerning the problems in workers' compensation laws.

c. Workplace Injury Involved Negligent Employer vs. Injury Caused by Third Party

Case 3-5

Wang was working in a cotton company located at Liaoning Province, and signed an employment contract with the employer. On November 15, 2005, Wang was designated to work on the packing

machine which was worn down by years without repair. At about 8:00 am, the packing machine suddenly caught on fire, and Wang was burnt so heavily that the pain made her lose control and fell down from third floor of the factory. There were multiple fractures in Wang's body of lumber vertebra, transverse process, and serious burn on her face and left hand. Through the authentication of medical legal experts, Wang's left eye sensitization and left hand functional loss were both temporary partial disability Degree 7; her right lower limb paralysis belonged to temporary partial disability Degree 8; and she needed to take two surgeries for comminuted fracture steel nail internal fixation.

During the period of living in hospital, Wang was mostly either in deep coma or in terrible situation that was extremely terrified, her husband decided to apply for workplace injury determination without Wang's oral or written authorization. On December 27, local labor and social security bureau made workplace injury decision.

However, when Wang was awake, her lawyer told her that she had better file tort action against her employer instead of only recovering from social insurance benefit if she wanted to get larger amount of compensation. Considering her poor economic situation and capacity of earning, Wang opposed the decision of workplace injury issued by local labor administration and claimed for repealing. Meanwhile, she sued the cotton company for tort compensation with claim for expenses of medical care, care of living, lost earning, disability allowance, traffic, authentication and spiritual loss amounting to RMB 500,000.

On February 27, 2006, local labor administration repealed the decision for workplace injury determination with the reason of lack of Wang's authorization. Although the cotton company took administrative action against labor administration, the District People's Court rejected the company's claim.

After two trials, the Intermediate People's Court made the decision which states that "according to Article 106 General Principle of PRC Civil Law, plaintiff Wang who was an employee of defendant, got injured during hours of work, the defendant should take the responsibility for his negligent behavior and pay for the damage brought to his employee." Finally, the court supported a part of Wang's claim as RMB 114,000.

Similar cases as Wang with preference to tort compensation abandoning social insurance can be found in many local workers' compensation practices. Obviously, Wang was not one of few cases in reality and she did take advantages of such choice to obtain higher compensation for her damage on the job.

However, this result is unfair to those victims who also get similar injuries, but only can recover relatively less insurance benefits from social security system. From this sense, Wang was lucky, but there are still millions of unlucky 'Wangs' who are suffering from the damage or illness brought by their works with basic living money.

The reason for this can be found as the large difference in compensation standards of tort liability and workers' compensation insurance program in China.[122] The amount of compensation received by victims usually is the focus of workers' compensation during workplace injury disputes; thereby victims tend to pursue compensation as much as possible. This can be solved by increasing standards of workers' compensation social insurance benefits gradually in China.

However, one may neglect another significant problem underlying the surface reasons. Article 12 of Judicial Interpretation 2003[20] states that "where a worker of an employer, who has the responsibility required by law to contribute to the workers' compensation social insurance program, suffers

[122] The Table 5-2 in Chapter 5 will show the difference of compensation standard between tort liability and workers' compensation social insurance program with specific comparison.

from a personal injury due to a work-related injury accident, and the worker or his close relatives brings a lawsuit to the people's court claiming against the employer for bearing civil compensation liabilities, he shall be informed to handle the matter in accordance with the 'Regulation on Workers' Compensation Insurance'", which means that the law has deprived the victims of the entitlement of getting compensation from tort system only if the workplace injury involves employer irrespective of employer's fault.

One may argue that the employers' contribution to workers' compensation insurance funding determines their immunity from tort claim. Despite the debate about the pros and cons of employers' entitlement of immunity which is far from over in other jurisdictions, the unfair and unjustified phenomenon does exist in workers' compensation practice, when such adoption of application rules of two remedies is put into the context of China. With comparison to workplace injuries caused by the third party, to those whose injuries or diseases are caused directly or indirectly by employers at fault, the only compensation that most of them received is relatively much lower benefits from social insurance program. To intensify the understanding of such unfair compensation problems in China, another case should be presented here.

Case 3-6

> Liu worked in building site 36 of a construction company in Liaoning Province from February 2005. The construction work was sub-contracted to a construction labor company registered in Sichuan Province which Zhang is in charge of. On April 25 2005, Liu and his co-workers were doing steel moulding sheets in the light well of the basement. Owing to the unfixed springboard, Liu did not stand still and slided down from the board to the ground. He was judged by medical expertise as having suffered waist compression fracture. Liu tended to live in the hospital, but Zhang who was in charge of him did not permit and sent Liu back home to rest for a few days.

Two weeks later, Liu's injury did not get better, but got worse. When Liu came back to the working site, Zhang refused to designate him any work and wanted to fire him. Liu was extremely upset but could not do anything but leave and went for legal aid.

In September 2005, due to the fact that Liu did not sign any labor contract with the construction company, Liu's lawyer had to submit the application to local social insurance administration for determination of employment relation. However, his application was rejected for inadequacy of evidence. This meant that Liu and his lawyer are forced to step on the complicated and time consuming process of workers' compensation from then on.

During September 2005 to October 2006, Liu fought for his poor compensation benefits with the construction company which took every opportunity to interrupt workers' compensation process with malice. Finally, under the extreme pressure of urgent living and the unequal bargaining power between construction company and him, Liu decided to accept labor mediation and came to compromise with the employer that Liu received RMB 5,500 as compensation for his bodily damage on the job at the price that Liu would never claim for compensation against the employer. And this amount of compensation was RMB 6,200 less than workers' compensation benefits provided by local social insurance administration.

First conclusion can be traced from Liu's workplace injury case (Case 3-6) above is the demerits lying in the administrative procedure of workers' compensation system, which makes victims miss the best time of medical cure and indirectly creates chances for irresponsible employers to escape from their liabilities. In addition, another concluding remark which weighs more than the

former is the unjustified application rules in laws concerning the adjustment of two compensation systems. This mainly reflects in the circumstance of workplace injury involving employers that deprive of injured workers' right to turn to tort liability system for help when the public system was not able to work things out. In the case above, when Liu was exhausted by the hopeless social insurance system, and even refused out of the door of tort system by law, he had no choice but compromise. In Case 3-5, even if the employer contributed negatively to Wang's workplace injury, Wang was still barred from the access to tort system.

Illustrated by Wang's case and Liu's case above, with regard to the workplace injuries involving employers, the victims, according to laws, are entitled to recover social insurance benefits only. On the other hand, as illustrated by other cases, it is possible for victims suffering from damages caused by the third party to get compensation from both remedies in some local areas. In this sense, it is fair to say that the victims are treated unequally by the law.

Through all the cases discussed above, the unequal protection that victims on the job received from broader workers' compensation system has been specifically analyzed in each respect. One may get a relatively concrete understanding of how the inadequacy of workers' compensation legislations and interpretations concerning the application rules of tort and social security systems affects compensation results regarding unfair protection of workers' compensation in practice. Irrespective direct or indirect causations, the specific domain of the relationship between tort liability and workers' compensation social insurance is central to the problems reflected above in Chinese reality. Hence, some reformative alternatives may need to be taken to solve such serious problems in workers' compensation practice of China.

B. Few Incentives to Prevent Workplace Accidents

The lack of clarification or justification of the relationship between tort liability system and social security system in workers' compensation laws may contribute to the lack of incentives in prevention, thereby resulting in extraordinarily high rate of work safety accidents for these years. When analyzing incentives to prevent work-related accidents, one can find some valuable empirical information in the existing Chinese statistics on the data of workplace injuries, notably on the data of work-related safety accidents. However, the information is not easily found, and even it is possible to collect some empirical data, it has rarely been done..

Table 3-1 below gives an overview of the number of the work safety accidents in all the industries and a few representative industries per year in China from 2003 to 2007. These data have been provided by the State Administration of Work Safety. However, concrete data for the number of workplace injuries, deaths and occupational diseases every year of China are difficult to find, if they exist at all. Although the figures showing in the table below might not directly indicate the exact number of work-connected injuries caused by the third party, as well as excluding the number of occupational diseases, they have some substantial overlaps and reflect each other to some extent.

According to these numbers, in spite of the decrease of work safety accidents and deaths with comparison to the former year, the average number still stays extraordinarily high. The average number of work safety accidents in all industries per year of China from 2003 to 2007 is 0.73 million, and the average death for 5 years is 0.12 million, let alone the numbers of injuries.

Table 3-1 Work Safety Accidents in All Industries of China[123]

Year	Accidents	Deaths	Deaths in Mine Industry
2007	506,117	101,540	3,786
2006	627,158	112,822	-----
2005	717,938	127,089	5,938
2004	803,571	136,755	6,027
2003	976,580	137,070	6,177

Source: Official Website of State Administration of Work Safety

The table above, to some extent, also implies that the numbers of workplace injuries, deaths and occupational diseases must be much larger than the numbers presented in current China every year.

There must be a number of elements which contribute to the high occurrence of work safety accidents in China. Accordingly, the lack of incentives in preventing such safety accidents accounts for a lion's share among the elements in China. With regard to the incentive of prevention in workplace injuries, both tort liability and workers' compensation social insurance program should be involved in the system of prevention in the broader workers' compensation system. Apart from that, another instrument which needs to be noted is the safety regulations.

Hence, in order to give incentives to employers and employees to prevent

[123] The data was mostly summarized from the website of State Administration of Work Safety of China, www. Chinasafetv.gov.cn. some figures cannot be found in the public information of authority.

industrial accidents and occupational diseases, and in order to compensate the victims of such accidents and diseases when they do occur, some kind of intervention in the work safety labor market is required, e.g. in the form of tort liability, safety regulation, or workers' compensation social insurance system. Notably under the circumstances of workplace accidents involving the gross negligence of employers, according to relevant laws, injured workers are barred from claiming compensation from the negligent or intent wrongdoers, which indirectly undermines their incentives to improve safety of working environments. In this sense, irresponsible employers are encouraged to escape their legal obligations otherwise.

One of the main objectives of tort system is the deterrence of wrongful and dangerous behavior. If there is a threat of a liability suit, potential injurers will behave more carefully, which will result in a lower accident probability.[124] Although whether, in practice, tort law is indeed an efficient instrument to deter wrongdoing is still highly debated in multiple domains of the world, immunity from tort system for their negligent even intent behaviors contributing to the workplace injuries will undoubtedly relieve the prevention consciousness of the irresponsible employers from the psychological front. When victims of work safety accidents cannot resort to tort liability system to sue the employers involved in their industrial injuries, employers will overlook the safety of the working environment and even deprive workers of legal entitlements without limits.

Predictably, most of the workers who suffer work-related injuries and occupational diseases in China are in the industries of high risks, such as construction, processing and manufacturing. It is everywhere to see that the employers let workers work without professional training beforehand which is illegal according to related safety regulations and laws in China.

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[124] Saskia Klosse and Ton Hartlief, Shifts in Compensating Work-Related Injuries and Diseases, Springer, Vienna 2007, p198.

Table 3-2 shows the period of time from starting to work to getting bodily damaged on the job among the victims who accepted interviews. The data are provided by Beijing Legal Aid and Research Centre focusing on the 329 work-connected cases from January 1 2008 to June 30 2009.[125] It must be noted that 117 cases have been excluded from the figures below due to the difficulty to identify the concrete time of getting injured on the job. (In the 117 cases, most of them were ultimately resulted from mediations without concrete records of such information).

According to these numbers, it is not hard to observe that 85 workplace injury cases happened less than a month after the workers started working which takes the largest percentage of all the cases (40.1 of 212 cases); and there are 155 cases that do not surpass 6 months from beginning of work. The figures reflect that it is an extremely short time when the workers suffered from industrial damages since they get work started.

[125] The cases is separated into 16 provinces or cities of China, including Beijing, Tianjin, Chongqing, Shanxi, Hebei, Qinghai, Gansu, Yunnan, Sichuan, Jiangsu, Jiangxi, Hainan, Ningxia, Henan, Shandong and Dalian.

Table 3-2 Time Period before Workplace Injury

Time Period	Number of Cases	Percentage (329)	Percentage (212)
Less than 1 month	85	25.8%	40.1%
1-3 months	50	15.2%	23.6%
3-6 months	20	6.1%	9.4%
6-12 months	12	3.6%	5.7%
1-2 years	9	2.7%	4.2%
More than 2 years	19	5.8%	9.0%

Source: Internal Research Report of Beijing Legal Aid and Research Centre

The high percentage of work-connected cases within short period of time can be explained by all the bad luck of those victims? It is barely fair to say yes. It shows that a main reason for most workplace accidents is lack of professional safety training among the injured workers, which should be a legal obligation of employers in China. Most workers in the construction sites said that they had never accepted any form of training about the knowledge of their work before they started to work; even with respect to the workers under mines, the employers only arranged professional training for three days, which was far from enough for a worker to learn necessary knowledge working in the mines. In

the manufacturing industry of purses and clothes, some employers do not inform their employees the possibility to touch the toxic chemical materials like benzene, and refuse to provide protection instruments; some even cheat on their workers about the dangerous working conditions on purpose. Furthermore, the service industry which is usually conceived as easy to handle also needs to train workers beforehand. For example, some workers have no idea of how to fasten the safety belt when they are cleaning the windows of high floors of the building which ultimately leads to their falling down. In the workplace injury case of Sheng, Sheng was introduced by a friend to a shoe manufactory one day in 2008, however, in the afternoon of the first day of work, Sheng's thumb of his right hand was pricked out by the sewing machine. And the only reason for his injury was that Sheng did not accept professional training of manipulating machines by his employers.

In addition, another main causal link of workplace injuries is working overtime. According to PRC Labor Law, the working hours for a worker should not exceed 8 hours per day, and not more than 40 hours totally per week. However, due to immunity from tort claims, employers usually deprive their workers of basic legal entitlements. Working overtime is ordinary among many workers who had experienced damages. Under the circumstances of overtime and over intensified work, most workers will feel exhausted and lose control of their behaviors. As a result, the industrial incidences are very likely to occur under fatigue without consciousness even if the workers know the safety knowledge of work.

Take Li's Case for example. Li was overloaded with work for 11 to 12 hours a day when the orders from clients for goods increased in his factory and his employers forced Li to catch up the work within extra hours. One day after he had worked for 10 hours, Li was hit by a blade flying out of a machine tool and got seriously injured in his right hand. Another industrial injury case happened on Luo of Shenyang. Luo was required to work for extra 6 hours one

day on the construction site, at approximately 1:00 am of the second day; Luo fell down from the truck carrying bricks unconsciously with extreme fatigue, and was heavily fractured in his thighbone and shinbone.

In the two cases above, the victims could only recover from the workers' compensation social insurance program, but had no right to sue against their employers for tort compensation owing to the provisions of legislations in China which has been analyzed in the section above. Such unreasonable immunity undermines the incentives of employers to prevent industrial accidents, e.g. training workers, improving working environments, and even indirectly encourages the irresponsible employers to escape from their legal obligations.

While there is apparently some doubt about the actual deterrent effect of tort liability system in cases of industrial accidents involving employers' negligent or intent behavior, one may argue that the existence of safety regulations and workers' compensation social insurance program might contribute more than tort system to the incentives of preventing industrial incidences.

Unfortunately, the no-fault social insurance program and safety regulations seem not work very well in current China. Many scholars has concluded that social security and no-fault compensation funds do not have this deterrent effects, unless they are backed by safety regulations or unless financial contributions to the social security system or fund are made dependent on factors relating to the accident risk.[126] That is why many industrialized countries pushed their workers' compensation insurance programs to the premium floated, and so did China. In China, the financial contributions to the workers' compensation social insurance program of the employers who are supposed to attend have been made dependent on factors relating to the accident risk. However, the work safety accidents are not far fewer than before due to a risk-related premium which was

[126] See S. Shavell, Liability for Harm versus Regulation of Safety, Journal of Legal Studies (JLS), 1984, p357.

introduced in workers' compensation social insurance program of China from the end of twentieth century. Interestingly, it makes many irresponsible employers especially the small enterprises avoid contributions to social insurance funds in China. The justified explanation of this problem might be that the costs of preventing workplace accidents and administrative costs of public social insurance are much higher for many employers of small enterprises to afford. This ultimately makes many of them choose to take the risk of escaping from legal obligations in China.

Table 3-3 gives an overview of attendance of social insurance or other private insurance of the injured workers in the 329 cases. Except for 95 cases which do not concern the insurance, there are 249 victims involved in the other 234 cases. According to the numbers, it can be seen that the coverage of public insurance among the workers is only 8.4%, 0.8% of the workers attended private insurance scheme. Apart from the numbers presented in the table, only 26 workers had signed any forms of employment contracts before they were injured, which takes 10.4% of all. The numbers has illustrated, from this sense that the effects of public insurance scheme seem to have been hardly positive as regards the deterrence of workplace accidents in current China.

Table 3-3 Public and Private Insurance Attendance

	Public Insurance (attend)	**Public Insurance (not attend)**	**Private Insurance (attend)**
Number	21	226	2
Percentage	8.4%	91%	0.8%

Source: Internal Research Report of Beijing Legal Aid and Research Centre

Apart from the low deterrence effect of public workers' compensation insurance program, an additional observation provided by the report of Beijing Legal Aid and Research Centre is that the impact of safety regulations on deterrence seems to have been regarded as low, mainly because of enforcement problems.

As discussed above, under the fact that both public insurance system and safety regulations appear to be weak in the control of risks, the lack of tort liability system in work-related injuries and occupational diseases involving employers contributes substantially to the low incentives of preventing work safety accidents in China.

The main problems analyzed above, unfair protection and low incentives of prevention are the most significant problems resulting from the non-clarified and unjustified relationship between tort liability and social insurance in workplace injuries and occupational diseases in current China. There are still many problems indirectly stemming from this issue that deserve concerns. Therefore, how to adjust the relationship between two compensation systems with regard to workplace injury and occupational disease is urgent for workers' compensation system in China.

CHAPTER 4 WORKERS' COMPENSATION MODEL THEORY AND ITS CHANGE THROUGH GLOBAL PERSPECTIVE

In this chapter, the author tries to understand Professor John Fleming[127]'s Model Theory, a far-reaching theory of workers' compensation model in dealing with the relationship between tort liability litigation and workers' compensation social insurance program (or social security system), to capture the most fundamental changes since the theory was first proposed in 1970s. The purpose of this chapter is to fill the gap between China and the world with respect to devising workers' compensation model, since China has been for long left out from this forum owing to its late industrialization compared to western developed countries. This chapter comprises four sections. The first section will introduce Professor Fleming's Model Theory in a brief manner, as the most important breakthrough of the theory in workers' compensation system model from the international perspective. In the second section, under the historical context, the major trends of workers' compensation systems with adjustment of two compensation remedies in the surveyed countries[128] over past thirty years will be discussed, and the reasons lying behind such trends will be given.[129] The

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[127] John Fleming, Professor of University of Berkeley, Law School. He is an honored scholar in tort law of common law jurisdictions. He first proposed his model theory of workers' compensation in his writing in "Tort Liability for Work Injury", Chapter 9, vol. XV, International Encyclopedia of Comparative Law.

[128] The countries surveyed and analyzed in this section will be focused mostly on a few Western European countries and the reference of historical change in the United States in a supplemented way, since their models of workers' compensation system are relatively typical and advanced with comparison of other countries' system; The fourth section of this chapter will generally be put into a global scale.

[129] This section is mainly based on the result of the second research project of the European Centre for Tort and Insurance Law on the impact of social security law on private tort law concerning personal injuries.

third section focuses on the corresponding impacts on the Model Theory that the trends of workers' compensation systems have brought in a specific way since it is beneficial for China to update the cutting-edge status of workers' compensation systems in other countries of the world. Lastly, the author will introduce the basic structures of workers' compensation systems in dealing with the relationship between tort liability and workers' compensation insurance program based on a general survey within the global scale.

I. FLEMING'S MODEL THEORY IN 1970s

For decades, from the emergence of workers' compensation insurance program when most industrialized countries of western world initiated to rearrange their workers' compensation systems, enormous efforts in taking the attempts to arrange different structures to adjust two remedies can be identified. In 1970s, Professor John Fleming has firstly proposed the Model Theory in which he summarized the ways of dealing with the relationship between tort liability litigation and workers' compensation social insurance program in workers' compensation systems among the worldwide countries into four types of models on the basis of his general study. And this Model Theory is still being referred to by many scholars of workers' compensation study nowadays as the most original and significant contribution to the study of workers' compensation system with the relationship between tort liability and social insurance. In general, the four models of workers' compensation system adopted by most countries have been as following[130]:

[130] The following introduction of Model Theory refers to John. G. Fleming, Tort Liability for Work Injury, Chapter 9, Vol. XV (Labour Law), International Encyclopedia of Comparative Law.

A. Relieving Model

Relieving Model, so called relieving the tortfeasor, is a type of workers' compensation model which excludes the injured employee's tort action right as a claimant once the occupational accidents or diseases occur. It means that the injured worker only can get benefits of workers' compensation through the channel of public social insurance schemes instead of getting compensation from the tortfeasor for his or her tort behavior. One thing worthy of highlighting is that it is not an absolute relief as it is called, but a relative relief, namely, only under certain circumstances which are explicitly stipulated in the statutes, can the tortfeasor's liability be relieved by the social insurance benefits. The circumstances are differently regulated in the countries adopting the Relieving Model, which usually include special tortfeasors (employer or co-employee under same employment), special accidents (occupational accidents and diseases, traffic accidents happening on the road to and from workplace), special damages (personal injury only), and special reasons (slight negligence usually). In the 1970s, the countries which adopt Relieving Model were Germany, France, Switzerland, South Africa and Norway.

As introduced in Chapter 2, the German model is a very typical and pioneering one and has been considered a sample to be imitated by other countries which aim at adopting the Relieving Model.

The Relieving Model was prevailingly adopted in many industrial countries of western world in the 1970s, with its outstanding advantages of relieving the tort burdens on the shoulders of employers and co-employees to some extent by spreading the losses into the whole society. The injured employees are guaranteed to get the urgent benefits they need for their damages instead of the endless waiting for uncertainty under tort claims for compensations against the individual tortfeasors. However, the secure benefits are based on the sacrifice of full compensation which includes both pecuniary and non-pecuniary losses. Meanwhile, the weak point of preventing damage of social insurance law is

obvious under the Relieving Model by forbidding the tort claims which rooted deeply in the common law jurisdictions as its deterrent function.

B. Electing Model

The Electing Model requires the injured workers to choose only one remedy between the private tort liability action and the public social insurance schemes as a way of obtaining remuneration when accidents happen, namely the tort compensation instead of the social insurance benefits, or vise versa. The electing right determines the incompatible relationship between tort liability and social insurance. Under no circumstances can both of them co-exist in a case of workers' compensation. This model had been adopted by Britain and most of the Commonwealth countries as their early stage of workers' compensation systems, while it came to abolition in the late 1970s.

Extremely differing ideological objectives in theory and practice of tort liability and social insurance in workers' compensation make employees' electing right accompanied with doomed sacrifice which leads to unfair treatments of similar cases. The attractive compensation but uncertainty of winning the claims of tort on the one hand, and guarantee of obtaining the awards but extremely poor benefits of social security schemes on the other, definitely will drag the injured workers into a dilemma. Therefore, the abandonment of the Electing Model reflects the modern philosophy and desire of adopting feasible workers' compensation systems in most countries since 1970s onwards.

C. Cumulating Model

The Cumulating Model, also called 'double recovery', means that the damaged worker not only can resort to social security bureau for social

insurance benefits, but also have access to file the claim against the tortfeasor for full compensation of his physical and moral damages. It can be obviously seen that under the Cumulating Model, it allows the possibility that injured workers might get maximized or even over compensated from two different resources which demand relatively better economic development of the countries which adopt it. Therefore, very few countries have adopted the Cumulating Model in the 1970s, except for the typical country Britain. According to the practice of 1948 National Insurance Law in Britain, after acquiring the full compensation under tort law, the victim can still get 50 percent of the social insurance benefits as well.

Compared to other models of workers' compensation, the double recovery would be the easiest way of dealing with the tort liability and social security but not the best way. But for the extremely positive consideration for the victims, the Cumulating Model does not have any other highlight any more.

Firstly, it aggravates the financing burdens of both employers and the society. The result of overcompensation which exceeds the actual needs of the victims would lead to a considerable waste of social resources. To consider the workers' compensation in a long-term perspective, overcompensation should be avoided in order to allocate limited social resources in a more proper way.

Secondly, the double recovery has been stepping far away from the original aim of the emergence of social insurance program, which targets at avoiding the endless process and unforeseeability of compensation in the tort systems of modern industrial countries. In other words, if the Cumulating Model becomes feasible, the most urgent calling for reform of tort law by many scholars in every corner of the world would be a meaningless clamor.

Therefore, we still can see the irresistible trend of abolition of double recovery in the future despite the adoption of Britain in late 1970s.

D. Supplementing Model

The Supplementing Model allows the co-existing rights of tort claim and social insurance when the occupational accidents happen, while the final compensation which is acquired by injured workers from both channels should not exceed the amount of money that they deserve. There are two attributes in the adoption of Supplementing Model. The first one is deduction, which means to deduct the amount of former compensation awarded to the victims from the latter compensation. And the second one is the right of recourse or subrogation, different names in different jurisdictions of countries, that aims to avoid the exclusion of tort liability of tortfeasors (employers, co-employees or third persons) to make them compensate within the amount they should repay under some circumstances. And the situations vary according to the statutes or specific cases of workers' compensation in different jurisdictions. In the 1970s, Japan, Chile and a few countries in Northern Europe have adopted the Supplementing Model.

The Supplementing Model can be seen as an elaborate model of workers' compensation in reconciling the tort liability and social insurance, compared with the former three models mentioned above. With its cooperation with administration, the Supplementing Model has maximized the benefits that injured employees should obtain, and minimized the risks of injured workers and their employers might face, while avoiding the waste of social security benefits by allocating the limited administrative resources into the most urgent places. What's more, the functions of deterrence and punishment of tort law can be retained and strengthened to prevent the industrial accidents efficiently.

It can be predicted that the effort towards the adoption and improvement of the Supplementing Model might become the common aim of workers' compensation systems in most modern countries all over the world. Although it has some demerits or disagreements in the enforcement of the Supplementing Model which would be discussed in the new trend of workers' compensation

system, the supplementation serves as the social welfare and fair treatment tool of workers' compensation in a more feasible way.

II. CHANGES OF WORKERS' COMPENSATION SYSTEMS AND REASONS BEHIND THEM

A. Mainstream of Social Insurance Programs and Tort System's Marginalization

Under the historical context of game play between social insurance program and tort liability in workers' compensation arena, it can be observed that social insurance program has won the dominancy over tort litigation from the end of twentieth century. With the rising importance of social insurance program in workers' compensation system, tort law is said to have lost much of its significance as in the nineteenth century. Traditional tort law has retreated to be an exceptional system and only can intervene in specific circumstances (wrongfulness with the injurer) and for particular types of damage: top of the income and non-pecuniary loss.[131] And this situation can be illustrated more obviously by workers' compensation systems in Western Europe at present.

According to the report of eleven selected European countries conducted by the European Centre of Tort and Insurance Law in 2001, a considerable number of these eleven countries use social security law[132] as their major compensation systems for accidental injuries at employment, while only a limited part of the damage occurring at workplace is compensated via tort law. In Germany, which

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[131] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003, p241; see also R.S.J. Schwitters, Riskante aansprakelijkheid, 1991 Recht en Kritiek, 5 et seq.

[132] In this section, the word "social security law" is sometimes used instead of social insurance program because most of the surveyed European countries have integrated workers' compensation social insurance program into their broader social security systems by consolidating their social security law.

is the most typical country to adopt the Relieving Model[133] proposed by Professor Fleming, compulsory social insurance replaces tort in the field of occupational accidents.[134] In Austria, employers' tort liability towards their employees is replaced by social insurance benefit. The "privilege concerning the employers' liability" releases employers and their executive staff (managers, supervisors etc.) from tort liability for occupational accidents and diseases they have caused to their employees unless they acted with intent.[135] In France, the compensation for industrial accidents has been entirely removed from the province of tort law. The similar situation of superior privilege of social security law for workers' compensation can also be found in Belgium, Greece, and Switzerland. More extensively, in New Zealand, tort law has been entirely replaced by a comprehensive social security scheme which includes not only workers' compensation, but also manifold of personal injuries as a consequence of other accidents. Even in the countries which do not establish the privilege of social security law in workers' compensation like England and Wales, Netherland, Spain, Sweden and America, the social security's influence on tort law can be demonstrated as the comparative deduction of social security's benefits from the compensation granted by tort system.

While in the United States, the social security law's dominated situation was probably the case in its legislative arena of workers' compensation since the beginning of mid-1970s.[136] Other than workers' compensation which is the forerunner of social security law, the law making with preference of social security over tort liability has been broadened to other areas of personal

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[133] See "Fleming's Model Theory in 1970s", Relieving Model above.

[134] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003, p282.

[135] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003, p281; see also Wolfgang Holzer, The Impact of Social Security Law on Tort Law in Austria, no.14.

[136] For more vivid picture of US's proposals towards an expansive coverage of workers' compensation model beginning in the mid-1970s, see Guido Calabresi, The Costs of Accidents,1970; see also Robert L. Rabin, The Renaissance of Accident Law Plans Revised, Stanford Public Law and Legal Theory Working Paper Series, 2004.

injury.[137] In the academic forum, the number of proposals with ardent wish for tort reform is considerably rising[138], in which the most provocative is Stephen Sugarman's book[139] as important vehicle for conveying the flavor of pressure on tort reform in the United States.

The justified reasons for social security law's dominancy trend and partial abolition of tort law can be seen partly in the history and legal tradition in specific countries. Take France for an example, since its first introduction of strict but limited liability of employers in 1898, according to which, the employees' claim rights under the general tort rules were deprived of. When it was removed from tort system and integrated into social security system in 1946, this tradition had naturally remained. In particular, employees did not recover the action rights against their employers until now.

Secondly, it may attribute to the inertia of unstoppable extension of social security in the nineteenth century and merely little improvement of tort law in workers' compensation over a long period of time with people's disappointment towards it. It is the poor performance of tort law as a compensation system that initiates the 'renaissance' of accidental law from 1970s in the United States, which might be seen as the most stubborn common law jurisdiction with respect to tort reform.[140] About two or three decades ago, some tort law scholars began to forecast the death of tort law. A famous German tort lawyer even asked, "ob dem Deliktsrecht nicht das Sterbeglocklein gelautet werde" ("whether tort law was not doomed to die").[141] Others aimed to look for diversities of alternatives

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[137] Since the focus of workers' compensation, other areas of personal injury won't be discussed in this thesis which include motor vehicle accident, medical malpractice, product liability, premises injuries and toxic exposures etc.

[138] See Richard Gaskins, Environmental Accidents: Personal Injury and Public Responsibility, 1989, Temple University Press, Philadelphia; see Donald Harris, Tort Law Reform in the United States, 1991, Oxford Journal of Legal Studies Vol.11; see also Robert L. Rabin, The Renaissance of Accident Law Plans Revised, Stanford Public Law and Legal Theory Working Paper Series, 2004.

[139] Stephen Sugarman, Doing Away with Personal Injury Law: New Compensation Mechanisms for Victims, Consumers and Business, 1989, Quorum Books.

[140] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p 107.

[141] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law

to replace tort law in personal injuries. Over about thirty years, the hot pot of debate has not entirely cooled down. Moreover, the nation-wide scale of social security legislation with its widely spreading safety net has enlarged to every corner of the world.

Thirdly, in some countries, the privilege of employers and co-employees is partly argued by that they contributed to the purchase of social insurance protection for being immune from the employers' liability under tort system.

Lastly and less convincingly, in German explanation for instance, law suits among members of one enterprise should be avoided since these would affect the working climate[142] due to legal proceedings.

B. A "Renaissance" of Tort Law in Western World without Entire Abolition

Although social insurance program's influence tends to be stronger, it still does not entirely supplant tort liability system in workers' compensation system hitherto. In the 1960s and 1970s proposals were put forward to replace tort law as far as personal injuries were concerned also in the field of traffic accidents, or even generally.[143] But apart from New Zealand[144], no other country and in particular no European country adopted a comprehensive social security scheme for compensating any kind of personal injuries instead of the traditional tort law.[145] There have been related proposals provided in Australia and the United Kingdom for considerations of implementing some form of comprehensive social security system, aware of the New Zealand's extensive compensation

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Vol.3, Springer Wien New York, 2003, Introduction.

[142] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003,p283.

[143] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003,p145.

[144] New Zealand Model represents a brand new model of workers' compensation and will be introduced specifically in the next section.

[145] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003,p280.

scheme; however, they have not been endorsed in the legislature arena, and until now these countries still remain the co-existence of social insurance program and tort liability litigation as the general structure of their workers' compensation systems.

Despite New Zealand's lonely extensive reform of tort law in personal injury, on the contrary, in something of a rollback, Netherland has radically switched its workers' compensation system back to cumulative remedies of tort liability and social security schemes. In the 1901 Industrial Injuries Insurance Act (Ongevallenwet), which was repealed in 1967, there was a specific legal "immunity" for the benefit of employers,[146] which means that employees in 1901 Dutch law have no right to file tort claims against the liable employers. Nevertheless, the employers' privilege in social insurance program was abolished in 1967 to recover the claim right of workers under tort rules in Netherland. Apart from Netherland, a few countries as England and Wales, Spain and Sweden make tort law be affected in no way by social insurance program concerning workers' compensation.

Therefore, in the general sense, as indicated above, tort law has been marginalized by striking expansion of social security law in workers' compensation area especially in many of the European countries over thirty years from 1970s, but its position as a remedy for compensating work-related injury and disease still remains unshakable on specific occasion in many countries all over the world. Moreover, even a few scholars think that, the issues that workers' compensation confronted at the time of the enactment of special laws, and in many ways still confronts today, not only provide a general template for the analysis of virtually any significant contemporary tort reform proposals, but also doubt whether it is the most feasible remedy to replace tort liability

[146] C. Edgar du Perron and Willem H. Van Boom, The Impact of Social Security Law on Tort Law in Netherland, no.21, Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003,p 155.

exclusively.[147]

The feasible explanations that can be traced for this trend might partly be a financial one, in the challenges that social security system faced more extensively in 1980s. More countries in Europe encountered financing problems to support increasingly soared upsurge in social security benefits especially when most of them were unable to make their economy develop rapidly as before.[148] In Europe in general and more particularly in the Netherlands, the financing of damage caused through accidents at work is concerned.[149] As the consequence of deregulation wave hit Europe in 1980s-for example in the Netherland, an increasing use of the liability system was advocated, so that tort law could be used more often to compensate accident victims, thereby releasing the social security system from this heavy burden.[150] In the 1970s, the cost of social security amounted to some thirty percent of Netherland's national income, thereby becoming a subject of national concern.[151] The policies that Dutch government has decided to make at the beginning of 1998 were aiming at saving up to 600 million Dutch guilders in social security system.[152] In New Zealand, where the most extensive tort replacement compensation system has been adopted, the financing constraints in the common sense would be predictable and seemed intractable. The ACC[153] (Accident Compensation Corporation)

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[147] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p40.

[148] Since 1980s, European countries came to a slowdown in economy development. For instance, Britain faced a deep recession from 1980.

[149] Michael Faure and Ton Hartlief, Social Security versus Tort Law as Instruments to compensate Personal Injuries: A Dutch Law and Economics Perspective, Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003,p241.

[150] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003, p241.

[151] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003, p267.

[152] In Netherland, more recent policy making is very typical to elaborate the deregulation wave. In Dutch workers' compensation, government decided to completely privatize the workers' compensation scheme at the beginning of 1996; for more elaborated materials in Netherland's deregulation wave, see Michael Faure, Ton Hartlief, Towards an Expanding Enterprise Liability in Europe? How to Analyze the Scope of Liability of Industrial Operators and their Insurers.

[153] New Zealand's accident compensation scheme introduced in 1974 is administered by the Accident Compensation Corporation, which is known for short as "ACC" and it is by that acronym that New Zealanders most commonly refer to the scheme as a whole.

experienced financial crisis in 1986, which has been overcome but initiated subsequent reforms of social security compensation system at the end of the twentieth century in New Zealand.[154]

Mostly due to the general and difficult financing problems that most countries have encountered since 1980s, as far as social security system for personal injury is concerned, an increasing number of limitations and restrictions of welfare state gradually become evident. A policy of discouraging any attitude, if such attitude ever existed, to rest in the so-called "social hammock" has begun to replace the former intensive enlargement of social security protection.[155] Therefore, yet in the modest sense, this decrease in protection through social security law consolidates the importance of tort law as a remedy of workers' injuries, and other types of personal damages as well. That explains the reason why, at present and in the ensuing years, none of surveyed countries in Europe along with the United States have undermined tort law in its entirety to leave compensation of bodily impaired persons deriving from work exclusively to social security system or workers' compensation social insurance program.[156]

Thirdly, the theoretical basis that tort law relies on differentiates the philosophy of social security law, and this may contribute to the intactness of tort liability remedy. Social insurance compensation for work-related injuries and occupational diseases, standing upon the risk-distribution rationale, tends to be a more pragmatic and standardized compensation remedy. Considering the urgent needs of victims as the principal compensating aim of social insurance program, the objective way of calculating losses within specified limits reflects its considerations of horizontal equity of members participating in the program. On the contrary, renowned for full compensation, the compensation granted by

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[154] The comprehensive compensation system in New Zealand will be discussed in more details below.

[155] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003, p304.

[156] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003, p318.

tort liability remedy is directly related to the concrete loss of the victim, including non-pecuniary loss especially which is normally excluded under social insurance system for work-related injury. Whereas the individualized compensation of tort law has been the target of criticism from the end of nineteenth century to even present, it undoubtedly retains the existence with respect to the compensation of immaterial loss solely granted by tort law.[157] Moreover, equally important, tort liability system functions as a mere recourse mechanism by transferring the responsibility of compensation to the people who actually cause the work-related injuries.

The reason for the significant role of tort liability system in the compensation of work-related injury also lies in its modification through the combination with private insurance system in many countries of the world. The interrelationship between tort liability and liability insurance is not the purpose of this thesis though; we cannot deny the extreme concern of this issue among tort law academia in western world especially nowadays. We tend today to think of the two systems as inextricably linked together, because the scope of tort liability has been enlarged to extraordinary extent over decades beginning with the employers' liability, thus it makes the liability insurance system naturally acquire the necessity of existence and evolvement.[158] As Lawrence Friedman suggests, the law of torts was never "a perfect instrument of oppression," and it was growing less oppressive as the twentieth century began.[159] Since cooperated with the private insurance schemes, the potential defendant's financial vulnerability would be strengthened by the integration of tort liability and private insurance system. And this integration makes tort liability system more attractive as an alternative remedy of work-related damages in some of western countries today.

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[157] Orin Kramer and Richard Briffault, Workers Compensation Strengthening the Social Compact,1991, p 265.

[158] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p53.

[159] Lawrence M. Friedman, A History of American Law, New York, 3rd edition, 2005, p357.

Last but not the least，the answer to the relatively stable position of tort liability in workers' compensation system may be found in the loyal commitment to the rule of law and to claims of corrective justice and the respect of individualism that most characterized the common law jurisdictions. "In other words, it held that every man of mature age must take care of himself. He need not expect to be saved from himself by legal paternalism... When he acted, he was held to have acted at his own risk with his eyes open, and he must abide the appointed consequences."[160] This statement according to Pound, epitomized the spirit of the common law.[161] When it comes to the American tort law, the feature of stressing upon individualism and self-reliance is manifest particularly in the development of the doctrine of contributory negligence and the fellow-servant rule.[162]

To sum up, as indicated above, within the development of compensation systems over thirty years, though gradually, the workers' compensation as the compromise of tort liability and social insurance has changed in many countries of the world. Although both sides of a coin have been analyzed above, a conclusion can be drawn through a wider lens, in general, that the social insurance benefit as the main part of workers' compensation system tends to play a dominate role despite the financial constraints, while the tort law mostly becomes a channel of compensating certain type of losses under certain circumstances, especially in most of the countries in Western Europe right now.

As refer to the changes above, it is never the old question proposed by the premier generation of tort law scholars that if the social security law has any impact on the traditional tort law in the area of workers' compensation, but that to what extent does the social security system replace the tort system for compensating work-related injury.[163] "Replace" is used in the sense that one

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[160] Roscoe Pound, The spirit of the Common Law, p19.
[161] Bernard Schwartz, The Law in America A history, McGraw-Hill Book Company, p58;
[162] Bernard Schwartz, The Law in America A history, McGraw-Hill Book Company, p58.
[163] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law

system ousts the other and regulates exclusively the compensation for bodily impairment.[164] This can be demonstrated by the workers' compensation systems in Western European countries and the United States as well. In Europe, Bismarck's social security model has made a far-reaching influence with the pioneering workers' compensation scheme. Viewed from the perspective of the injured person, tort liability remedy mainly serves the function to fill gaps which the social insurance program still leaves. The bigger these gaps are the greater is the need to invoke tort law and the greater is the importance of tort law for injured persons.[165]

In the United States, this change can be traced in the facts that workers' compensation has become a model of social security scheme being expansively stretching to other areas of personal injury since 1980s.[166] One common point needed to be mentioned is that despite the special comprehensive system of personal damage, it has to be observed that neither of the Western European countries and the United States seems to adopt one single social security system without the participation of tort liability system concerning workplace injuries and occupational diseases. According to the comparative report of Western Europe, it is mainly owed to the tradition and the historical development from a mere workers' compensation scheme to extended social security protection that the countries under review have very complex and complicated systems of social security- composed of many single roots.[167] Therefore, the co-existence of tort liability litigation and social insurance program in workers' compensation system will bring the interaction between two of them, and on the other hand,

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Vol.3, Springer Wien New York, 2003, p280.

[164] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003, p280.

[165] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003, p304.

[166] For more expansive coverage of the workers' compensation model, see Orin Kramer & Richard Briffault, Workers' compensation: Strengthening the Social Compact, 1991; also see Robert L. Rabin, The Renaissance of Accident Law Plans Revisited, Stanford Public Law and Legal Theory Working Paper Series,2004.

[167] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003, p268.

under some circumstances, a clear line needs to be drawn between tort liability and social insurance program when the workplace accidents occur. Such changes over thirty years happening in the surveyed western countries will lead to the variations of workers' compensation Model Theory proposed by Professor Fleming in the 1970s.

III. CORRESPONDING CHANGES OF MODEL THEORY OF 1970s

A. Disappearance of the Electing Model and the Cumulating Model

Purely sole remedy as Electing Model and the mere combination of both remedies as Cumulating Model for workers' compensation in 1970s can not survive through a period of time due to inadequacy of theoretical and practical basis of them. As can be observed in the changes of workers' compensation systems, both the Electing Model and the Cumulating Model have been ousted from the adjustment model of tort liability and social security in workers' compensation systems in almost all the countries at present.[168] In the 1970s, the Electing Model was abolished by Britain and the Commonwealth countries that used to adopt as their preliminary compensation systems. However, right now, Britain has abandoned the Cumulating Model that it used to avail thirty years ago and switched to a more feasible workers' compensation scheme.

The possible explanation for this partially radical change of the workers' compensation Model Theory is not difficult to imagine considering the evidently unsatisfying logics underlying the two models.

As far as the Electing Model is concerned, the injured workers are offered the entitlement to make a choice freely between tort claims and social insurance benefits, depending on the individualized needs. It seems to be beneficial to the

[168] A few Asian countries which still use the Electing Model, and Section IV in this chapter will give an 6brief introduction.

victims, in the superficial sense, whereas the disadvantages lying in the Electing Model can be illustrated, as the opposite meaning of its name, by its essence that deprives of victims' electing rights. Injured workers are forced to accept the little amount of lash-up by waiving the possibility of rehabilitating to work in the long run, in particular the serious circumstances as disability or handicap. However, on the other hand, choosing the tort remedy means to play a damage 'lottery' with the chance of obtaining nothing except endless waiting and the agony of injuries. In serious cases, claims often take six or seven years to settle, some cases take even ten or eleven years -in other words longer than the Second World War.[169] Without the urgent compensation, many families have come to desperation when the only bread-winners lose their jobs. A perfect decision never can be made by the poor victims while facing such a dilemma. But for the certain circumstance which aims at abolishing the traditional tort law from the origin, under such Electing Model, there is no social justice in any sense. The Electing model is the breach of social justice by entitling tortfeasors the vantage of escaping from the responsibility of damages caused by themselves, and even at most, compensating for the actual losses of victims in very few cases. Therefore, whether judging from the practical effect or from basic principles of social justice, the Electing Model will be ousted from the modern workers' compensation system sooner or later.

The Cumulating Model's failure lies in the hypothesis that it relies on. The first one is the legitimacy of windfall. But it has been generally accepted that people should not acquire the windfall in both the common law and the continental law jurisdictions. Furthermore, within the framework of relatively limited global social resources, the injured person should not have the same need met twice over, which is more than fair compensation. The second hypothesis of the Cumulating Model is that the tort law's function of deterrence and punishment can be reflected under the model. Nevertheless, this is far more

[169] P S Atiyah, The Damage Lottery, Oxford: Hart Publisher. 1997, p151.

agreeable. Neglected the controversy over the deterrence function of tort law, which has become a sound disapproval of it, especially when the tort liability has been related to the liability insurance market, even if its function as such does work, it does not mean that there is no other better means to replace the double recovery when the prevention aim can be satisfied meanwhile. Some may argue that due to the extremely low standard of social security benefits of workers' compensation in the industrial countries, double recovery should be allowed temporarily at the young age of industrialization. Although this argument can win some support from the socio-legal forum, it should not be adopted as a feasible explanation for the rationale of the Cumulating Model's existence. Because only taking measures to increase the social security benefits for workers' compensation can solve the problem in the essential way, but not the adoption of double recovery. Apart from the pressure upon the hypothesis of it, there are piles of disagreements over the Cumulating Model. For instance, as Professor Friedmann[170] described as one of the worries of giving an injured person full compensation from both sources even more than fair compensation, "full compensation from both sources would lead to an increase in litigation because the risk of common law action was lessened by the certainty of insurance benefit."[171] When each hypothesis fails to support the Cumulating Model one after another, it comes to its end in Britain where the double recovery was allowed at the time of 1970s.

As analyzed above, over thirty years, the fall of both the Electing Model and the Cumulating Model has been the natural result of the need for more sophisticated workers' compensation systems by modern countries all over the world. It can be considered as an evolutionary change of Fleming's model theory over thirty years since 1970s.

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[170] W.G. Friedmann, Professor of Public Law, University of Melbourne.

[171] W.G. Friedmann, Social Insurance and the Principles of Tort Liability, 63 Harvard Law Review, p254,1949.

B. Prevailing Adoptions and Modifications of Supplementing Model

The Supplementing Model stands on a clear boundary of the actual amount of compensation that an injured worker should get due to his out-of-pocket losses. Basically, it permits the recovery from the tort action in addition to a claim for the no-fault social insurance. What's different is that the benefits should be set off against the tort judgment to avoid double recovery. Conceivably, the Supplementing model tends to be a more sophisticated one, compared with other three in the institutional sense.

Over thirty years since it was proposed, apart from Japan, Northern Europe and Chile, which have taken it as workers' compensation system in the 1970s, most countries in Western Europe, along with a substantial number of states of the United States have been adopting the supplementing model as their compensation system for occupational victims.[172]

According to the survey[173] of many countries of Europe, where tort law and social security law co-exist independently of each other, social security benefits must be deducted from tort damages and the tortfeasor must be forced to contribute to those benefits mainly by way of recourse action.[174] This conclusion can be illustrated by the practical institution of workers' compensation systems in the specific country. England and Wales is the typical state with its switch to Supplementing Model in workers' compensation at the end of 1980s. Although the compensator has a duty to repay the benefits received in full, in most cases the cost of doing so is reduced because the compensator is allowed to set off the benefits against part of the damages due to the injured person.[175] Other countries in Western Europe, such as Netherlands,

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[172] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation,1992, p202.
[173] A project conducted by the European Centre of Tort and Insurance Law in 2001, its aim was to investigate the impact of social security law on private tort law concerning personal injuries.
[174] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003, p283.
[175] Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003, p64.

Spain and Sweden tend to face the common problem of the Supplementing Model that neither should the victim be overcompensated nor the tortfeasor unjustifiably relieved. In United States, a few states like Oregon, Washington and West Virginia have enacted workers' compensation legislation authorizing the Supplementing Model, many other states have moved toward the verge of adopting the model through judicial systems, such as California and Michigan, etc.

The expanding popularity shows that the Supplementing Model has become a norm of workers' compensation systems of many modern industrialized countries and has been successfully embedded in their consciousness. The Supplementing Model allows the co-existence of remedies from both tort law and social security law and requires avoidance of double recovery. From this sense, most countries in Western Europe and some states of the United States have applauded for, and accepted it, as their common goal of workers' compensation systems. In theory, the victim obtains no more than what he has lost, the defendant pays the entire bill of compensation, and the public purse avoids bearing the cost of financially supporting those injured by another's wrongdoing.

The other change of the Supplementing Model is demonstrated by various modifications of concrete workers' compensation in different countries which adopt this model. Given much institutional support, a more tailored compensation system is needed to meet the interests of different parties of occupational accidents. Most countries in Western Europe try to establish the recourse rights granted to the social security agencies which awarded the benefits. The concrete institutional solutions to support the Supplementing Model, however, show remarkable variations. Among the countries which establish recourse actions, the prerequisites to initiate such administrative power vary. While in England and Wales, where victims had no right of recourse until a

benefit recovery scheme was established by legislation in 1989, the CRU[176] is exceptional in adopting a completely different institutional system to claw back the benefits that should be paid by tortfeasors, compared with similar recourse agencies of other countries. Furthermore, Switzerland solves the institutional problem of Supplementing Model without bringing in the recourse action. In the United States, the subrogation right plays the same role as recourse right of Western Europe, notwithstanding the settlements to be more complex. The modifications may probably be due to the fact that the Supplementing Model needs a more sophisticated institutional system to support it. What's more, the traditional and historical element partly contributes to the variations of different countries as well.

From the changes described above, it may lead to the observation that the Supplementing Model has been widely accepted by many developed industrialized countries in Western Europe as a norm of workers' compensation system arrangement and various institutional modifications have derived from this model. Its dominancy can be illustrated mainly by the superiority of the model itself. The Supplementing model with more feasible logics compared with the other three results from the interaction between the private tort liability and the public social insurance program over centuries. It meets with the requirement of the higher social justice, thus becoming attractive because it appears to avoid not only subsidizing the defendant but also over-compensating the accident injurer. Secondly, the Supplementing Model combines the positive functions of both public welfare state and private tort liability. The advantages not only reflect in that the injured person can get urgent compensation in due time from social insurance benefits and the compensation not covered by workers' compensation statutes via tort claims, but in the deterrent and punitive roles tort liability can play in workers' compensation system.

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[176] CRU, the Compensation Recovery Unit was established in 1989 with the purpose to claw back those benefits whenever a tortfeasor is liable for the damage of the person receiving social insurance benefits.

Finally, the two basis of the model's framework can satisfy the need for a more sophisticated workers' compensation system of modern industrialized countries.

However, the disadvantages of the Supplementing Model are also obvious. The countries which decide to adopt this model have to foot the large financial budget of running both private tort system and public social insurance schemes. What they need to ponder over is whether taking the risk of paying the enormous bill is worthy of exchanging such a sophisticated workers' compensation system which might be beyond their actual need. Not like the "historic compromise", the rock upon which the Relieving Model was built, the Supplementing Model is more like the "double-edged sword", which has to pay for the complicated institutional costs when it favors the retention of a cause of tort liability action within a broader framework of workers' compensation system.

C. Emergence of Brand New Model: New Zealand's Exclusive Tort Replaced Workers' Compensation System

a. Overview of New Zealand's New Model

New Zealand's compensation system has experienced an extensive reform in 1970s and l to an initiative example of comprehensive compensation scheme for personal injuries including industrial accidents. Workers' compensation in New Zealand is part of a compulsory, national, no-fault accident insurance compensation system.[177] All accidents, whether they occur at work, at home, on the road, or the sport field, regardless of who is at fault, are covered by the

[177] Effective April 1, 1974, New Zealand established the Accident Compensation Corporation that replaced: a. a workers' compensation, b. a third-party liability based motor vehicle insurance scheme, c. a criminal compensation tribunal that provided compensation to victims of criminal acts, d. a common law fault system that applied to all other accidents. New Zealand retained its separate social security system which covers health and medical care and benefits for sickness, disability and unemployment.

general accident insurance system.[178]

Workers' compensation model in New Zealand is totally different from the four models of Professor Fleming's Model Theory, because it is a comparatively exclusive remedy (no-fault only) compensation model, compared to other four ones whose aim is to deal with the relationship between private tort system and public social insurance program. New Zealand's model replaces the common law cause of action with an absolutely no-fault compensation scheme, which has been considered the most ambitious reform of tort law in the common law world by Mr. Geoffrey Palmer.[179]

According to its universal social insurance program, workers have no right to sue for damages for occupational injuries or diseases caused by any accident covered by the comprehensive compensation system. Notions of 'fault', 'deterrence', 'punishment', or 'retributive justice' are foreign to the system's theory and practice, except in very exceptional circumstances such as the refusal to compensate those persons who willfully inflict their injuries on themselves.[180] Generally, all the wage earners, including New Zealanders working overseas, are covered by the broad social insurance program. The social insurance benefits covered by New Zealand's scheme for injured workers include the weekly compensation, lump sum compensation for non-economic loss[181], and medical and rehabilitation expenses.

The main underpinnings of New Zealand's extensive replacement tort compensation model are the "community's responsibility" to compensate the injured worker and the "comprehensive entitlement", namely the latter's right to

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[178] Comparative Review of Workers' Compensation Systems in Select Jurisdictions, 1999,p2.

[179] Geoffrey Palmer, an opposition Member of Parliament in New Zealand and a former academic, was one of the architects of the New Zealand scheme. He was retained by the government to draft a white paper on the 1967 Woodhouse Report. He acted as Woodhouse's principal assistant in the Inquiry into Compensation and Rehabilitation in Australia.

[180] Lewis N. Klar, New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective, University of Toronto Law Journal, 1983, p81.

[181] By an Act of 1992 in New Zealand, the lump sum compensation for non-economic loss was abolished, replacing it with a periodic independence allowance paid in a more restrictive set of circumstances.

receive such compensation with no questions asked, which has been stated in the Woodhouse Report[182] in the following manner:[183]

Just as a modern society benefits from the productive work of its citizens, so should society accept responsibility for those willing to work but prevented from doing so by physical incapacity. And, since we all persist in following community activities, which year by year exact a predictable and inevitable price in bodily injury, so should we all share in sustaining those who become the random but statistically inevitable victims.

b. Reasons for New Zealand Model

The more essential reason needs to be explored since compensation systems of most countries have to face the similar defects of tort law system, while only New Zealand has removed the tort liability system from its compensation framework. The financial reason was most strong argument as the essential impetus of New Zealand's compensation model – new sources of revenue would be needed rather than making better use of existing money.[184] That is, if the tort liability system survived, a comprehensive system of compensation for personal injuries would be unattainable, thus the financial logic of the reform would be destroyed.

Impelled by the financial incentive, strategically, the Woodhouse Report's exclusive concentration on the weaknesses and inefficiencies of the tort law process accounts more importance to the abolition of common law right of action in New Zealand's compensation system. The disappointing performance

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[182] Woodhouse Report, is the most important document to initiate New Zealand's tort law reform in personal injury. It is written by the Royal Commission of Inquiry into Compensation for Personal Injury, whose Chairman is Mr. Justice Woodhouse.

[183] Royal Commission of Inquiry into Compensation for Personal Injury, Compensation for Personal Injury in New Zealand : Report of the Royal Commission of Inquiry,1967,(Woodhouse Report), §56.

[184] Palmer, Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia, 1979, p271.

of tort liability in personal injuries with its fault principle, slow moving and expensive process and involvement of considerable risks of failure weighs much in determining whether to obsolete the common law remedy from compensation system.

Apart from the financial and strategic arguments, the traditional element also accounts. It is not a surprise that New Zealand takes the bold attempt of adopting such a workers' compensation system which restricts common law rights to a so large extent, because New Zealand has frequently been described as a "social laboratory"[185] on account of its long-established reputation for progressive social policy. In 1893, when it extended voting rights to women, it was the first country to introduce universal suffrage.[186] In 1898, it introduced old-age pensions, in 1900 workers' compensation, and its Criminal Injuries Compensation Scheme (1964) was the first in the common law world. The beginning of New Zealand's reform of compensation system can be traced to 1963, while the Committee[187] recognized the death and injury toll on the roads as an alarming problem, it recommended that reform be delayed pending a review of the whole basis of the existing system of accident compensation, and in particular the system of compensating for industrial accidents. From then on, New Zealand embarked on its unique reform road of compensation system beyond other countries all over the world.

c. Support and Criticism

Today, New Zealand's compensation system costs account for approximately 5% of total government expenditure,[188] among which 40% goes

[185] Oliphant, K. 'Accident Compensation in New Zealand', in Ewald, F et al (Ed.), Risques, Assurances, Responsabilites, Droit In-Situ, 2008.
[186] Oliphant, K. 'Accident Compensation in New Zealand', in Ewald, F et al (Ed.), Risques, Assurances, Responsabilites, Droit In-Situ, 2008.
[187] Committee on Absolute Liability, a Committee established in New Zealand for giving serious consideration to reform of the basis of compensation in road accident cases.
[188] Oliphant, K. 'Accident Compensation in New Zealand', in Ewald, F et al (Ed.), Risques,

to workers' compensation. The scheme has been described as 'the most rational and the most humane compensation law in the world'[189], and is frequently said to have the support of New Zealanders in general with its most recently record claimant satisfaction rate at 80%.[190] Nevertheless, there are a number of criticisms towards the extensive abolition of tort right in compensation system and the basic Woodhouse proposal; the most significant ones have been the following.

Firstly, it is not a fairly established trade-off to sacrifice the tort right of action for compensatory damages in exchange of the guarantee of a minimum level of income maintenance and health care granted by the compulsory insurance scheme. A second criticism is that an exclusive no-fault compensation system cannot deploy the deterrence function to deter the careless conduct without the supplement of tort liability system, thus it will inevitably promote an increase in accident rates. Besides, the overload financial burden is another fundamental problem. It reflected in the financial difficulties experienced by ACC in the 1980s.

d. Future of New Zealand Model

New Zealand's compensation system (ACC) is the most extensive no-fault compensation scheme to have been implemented in the common law world, and the most radical departure from private tort system. It received support from a number of writers[191] in and outside New Zealand, but nowhere else has it been adopted by government until now. Britain was confidently expected by some to be ready to follow the New Zealand example in 1978, but the proposals for no-fault in particular areas (e.g. road accidents) have so far been ignored, and

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Assurances, Responsabilites, Droit In-Situ, 2008.

[189] ACC, Thirty Years of Kiwis Helping Kiwis, 1974-2004, p3.

[190] ACC, Annual Report 2005, p44.

[191] See, e.g., D. Harris, Compensation and Support for Illness and Injury, 1984; T.Ison, Compensation Systems for Injury and Disease: The policy Options, 1994; and S.D. Sugarman's book, Doing Away with Personal Injury Law, 1989.

Britain still permits the co-existence of both private and public right of compensation for work injuries at present.

Among academics, there have been comments about New Zealand's going too far on the matter of the abolition of common law rights in workers' compensation, even some demands for at least the partial return of the tort liability remedy. Especially after the lump sum compensation for non-pecuniary loss was eliminated from social insurance benefits granted by the scheme by 1992 Act,[192] it was clear from the reaction that many New Zealanders viewed the elimination of their tort rights as acceptable only if in return they received comparable rights under accident compensation. Therefore, any reduction in accident compensation without the restoration of common law rights is considered "a breach of the social contract" entered into between the citizens and the government.[193]

From the views for and against New Zealand's exclusive no-fault compensation system presented above, one conclusion can be drawn that New Zealand's workers' compensation model, as a brand new model for the original Model Theory, provokes much inspiring thoughts and offers a brand new perspective in dealing with the relationship between private tort liability and public social insurance for other countries in the world. No matter which direction New Zealand's compensation system leads to in the future, more considerations and sparkles of better workers' compensation models will be inspired.

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[192] Accident Rehabilitation and Compensation Insurance Act 1992.

[193] Lewis N. Klar, New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective, University of Toronto Law Journal, 1983, p104.

IV. GENERAL SURVEY OF WORKERS' COMPENSATION SYSTEM THROUGHOUT THE WORLD

In this section, author will summarize the general structures of workers' compensation system in operating the relationship between tort liability systems and workers' compensation insurance programs in 21 countries all over the world. The structures of the systems, in this sense, can be categorized into four types as follows:[194]

A. Exclusive Tort Replacement in Workers' Compensation System

New Zealand: Tort liability is totally replaced by workers' compensation, and no recourse for the workers' compensation insurer against the employer.

Norway: Employers' liability generally replaced by workers' compensation programs; tort law applicable only in the case of injuries and diseases not covered by the workers' compensation Act.

South Africa: No direct claim by the victim in case of fault on the part of the employer.

B. Partial Tort Replacement except Employers at Intention

Argentina: Direct tort law claim by the victim against the employer excluded (since the reform of 1996), except intent.

Belgium: Employers' liability (tort law) is replaced by workers' compensation programs; the employee can file a claim against the employer, only in the case of intent on the part of the employer

Germany: Employers' liability generally replaced by workers'

[194] Munich Re Group, Workers' Compensation –Analysis of Private and Public Systems, p140-168.

compensation programs except in case of intention of the employer.

C. Partial Tort Replacement except Employers at Fault or Negligence

Australia (New South Wales): Direct tort law claim by the victim against the employer in case of fault for economic losses (not limited) and non-economic losses (maximum $204,350.00) within workers' compensation insurance coverage.

Brazil: Direct tort law claim by the victim in case of fault on the part of the employer; recourse for the workers' compensation insurer against the employer in case of intent or fault or breach of the insurance contract.

Colombia: Tort claim against employers at fault is allowed; No recourse for the workers' compensation insurer against the employer in case of fault.

Denmark: The same as Colombia.

Estonia: Direct claim of the injured worker in case of fault; recourse of the workers' compensation insurers against the employer is possible.

Finland: Direct claim of the victim against the employer in case of fault.

France: Tort suit by the industrial injury worker in case of "faute inexcusable" (gross negligence) is allowed; recourse for the workers' compensation insure against the employer in case of gross negligence.

India: The WCA and ESI[195] allow tort law claim by the worker in case of fault on the part of the employer (negligence-based liability); no recourse action.

Italy: Direct tort law claim by the victim against the employer in case of fault of employer (in case of serious bodily injuries resulting in absence from the workplace for more as 40 days or in case of an occupational disease); recourse for the workers' compensation insurer against the employer under the same

[195] WCA, Workmen's Compensation Act of 1923; ESI, Employees' State Insurance Act of 1948.

conditions.

Netherland: Tort liability claim by on-the-job victim in case of fault on the part of the employer (negligence-based liability); recourse for the insurer against the employer for benefits in cash (after the first year of incapacity).

Portugal: Tort suit by the industrial injury worker in case of fault; recourse against employers is possible, but rarely realized due to long duration of court procedures; liability regime enforced in the reform of 1997.

United Kingdom: Direct tort law claim by the victim against the employer in case of fault (in certain situations also strict liability); (Social security) pension insurer has recourse against the employer in case of fault.

United States (California): Combined policy for workers' compensation programs and employers' liability claims; employers' liability only in rare cases (on-the-job injuries that are not work-related; e.g. ingesting tainted food on the employer's premises, assaults by non employees; claims of spouses and dependants for loss of consortium, third parties' "actions over" against employers).

D. Elected Workers' Compensation System between Two Remedies

Singapore: There is unlimited liability of the employer based on his fault. The victim has a right to choose between receiving workers' compensation insurance benefits and lodging a liability claim against the employer in the event of a workplace injury. The victim has a right to recover from the workers' compensation insurer if the liability claim fails. However, more victims choose the workers' compensation insurance benefits than those choose tort claims.

South Korea: Direct civil law claim by the victim against the employer in case of negligence or intent is not prohibited. The victim has a right to choose between receiving special disability benefit under workers' compensation

programs and filing a tort claim against the employer in the event of an injury. What is the same as Singapore, the workers' compensation benefits are more common than tort liability claims.

In this chapter, based on general and specific studies of workers' compensation systems throughout the world, in particular Western Europe, United States and New Zealand, workers' compensation system structures of operating the relationship between tort liability system and social insurance programs have been explored in the legal, social and historical context from a comparative perspective.

In general, the access to public social insurance benefits for work-related injuries is much easier in most industrial countries under review when compared to employing the machinery of private tort liability in most circumstances. Further factual reasons to prefer no-fault workers' compensation social insurance program protection in most reviewed jurisdictions are that the injured person neither needs to identify an individual tortfeasor nor runs the risk that the tortfeasor will be insolvent. All these reasons have led to the consequence that private tort liability has been replaced by public social insurance protection as the remedy of workers' compensation to a much wider extent.

However, the problems that workers' compensation program has been and is facing seem to make it difficult to accomplish the exclusively tort liability substituted mission until today. A major consequence of the decades-long tension between controlling costs and providing adequate benefit levels has been for workers to seek ways of supplementing their workers' compensation awards.[196] More ironically, their exploring of the answer has led the injured workers back to the tort liability system.

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[196] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, 2008, p66.

As perceived in many western countries, the interactional relationship between the no-fault workers' compensation social insurance program and tort liability system makes the idea of absolute exclusion of tort remedy from compensation system for work-related injury and occupational disease seemingly irrational and unlikely. Owing to the difficulty to finance the broad social insurance systems, the cost of the compensation systems increases immensely whereas the number of active contributors to the collective insurance schemes shrinks in most reviewed countries of Western Europe in particular. And this problem becomes more obvious as the society enters into old-aged era which is also a future problem China will encounter. Therefore, it is very likely and seems inevitable that these countries will reduce the scope and extension of public social insurance protection in the future years. And workers' compensation as a significant part of social security compensation system will be substantially affected indeed. Thus, since the limits of the welfare state have become evident, the policy has rested and begun to replace the former intensive enlargement of social security protection in workers' compensation. Correspondingly, this change has the consequence that the decrease in protection of occupational accidents and diseases through public social insurance programs necessarily strengthens the importance of private tort liability in this field. This may lead to a certain 'renaissance' of the significance of private tort liability in workers' compensation.

As reflected in the evolution of Model Theory over thirty years, very few countries have denied in any way the injured workers' entitlement to full compensation they deserve, or restricted in very limited way if any, despite the possible compensation under tort liability. Because there is not any justification to exempt tortfeasors from their own liability, the recourse right for the social security agencies to seek compensation from the real wrongdoers becomes increasingly crucial and indispensable, which requires more sophisticated and elaborate institutional support of the workers' compensation system. And many

countries have tried differing institutional measures to get their social security agencies reimbursed from the tortfeasors. In this regard, the England and Wales' unique way of recourse action with its advance inquiry and its time limits appears to be more efficient,[197] and it might become a model for China's future establishment of recourse action in workers' compensation.

What is the better view of the relationship between tort law and workers' compensation insurance programs within broader workers' compensation system? The answer is impossible to be uniform and given in an objective way, as it is the one on which people with different political, legal, traditional and cultural beliefs will give different answers. Quite obviously, the countries which put on a strong emphasis on equality and social solidarity are more likely to prefer the workers' compensation social insurance programs, whereas other countries which put their trust into private autonomy and individualism will tend to hold the view that tort liability system should come first in the workers' compensation system.[198]

Since it is time by no means that we can ignore the positive functions served by tort liability and no-fault workers' compensation social insurance program in workers' compensation system, the combination of tort law and liability insurance lies in a much safer harbor today than thirty years ago. The exclusive replacement of tort liability by a comprehensive workers' compensation insurance program within the foreseeable future in most jurisdictions is unlikely, and China will not be an exception.

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[197] The concrete institution of workers' compensation concerning the recourse action of England and Wales will not be introduced in more details here. See Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003, England and Wales.

[198] C. Arthur Williams, Jr., An International Comparison of Workers' Compensation,1992, p210.

CHAPTER 5 FEASIBLE STRUCTURE FOR WORKERS' COMPENSATION SYSTEM OF CHINA

In the previous chapter, given the discussion of model choices of some western countries where the exploration of a feasible relationship between tort law and social insurance law started long time ago and is ongoing more intensively than in China, it is possible to detect some useful trends and changes in the way in which compensation for damage arising from work-related injuries and diseases has been arranged in other legal jurisdictions. Since the introduction of the Model Theory in 1970s, few major changes have taken place with regard to compensation system models for work-related injuries, irrespective some substantial modifications. In the academic arena of China, the suggestions and arguments concerning this issue are mostly based on the limitations of the Model Theory. However, it should be noted that the basic, sometimes also the most effective way, to solve this problem may require standing out of the problem and look at the grounding issues instead. This is not to discard the Model Theory entirely, which in fact helps substantially to understand the framework. Therefore, this chapter tries to come up with a general framework for compensation system in China in the way of adjusting the relationship between tort liability litigation and social insurance program – the Chinese model choice.

For the purpose of clarifying the general structure of workers' compensation system for industrial injuries the following questions seem to be important to ask. First, can either compensation system, the tort liability or the public insurance program, be replaced by the other in the compensation system for workplace damage in China? Second, if the answer is no, then in what

sequence should the two compensation systems be arranged and which remedy should play the dominant role in broader workers' compensation system of China? Last but not the least, should the duplication of compensation from the two systems for these injuries and diseases be permitted in China? To answer the above questions, various arguments, some of which are supported by empirical evidence, are required. This chapter attempts to answer these significant questions in three sections.

I. EITHER REMEDY IS IRREPLACEABLE IN WORKERS' COMPENSATION SYSTEM OF CHINA

Does the social insurance program replace the tort liability in the area of compensation for damages relating to work, or vice versa? Similar questions have already been proposed not only in the area of work-related injuries and diseases, but also in the broader area of personal damages. And the answers vary according to quite different arrangements of workers' compensation system structures in different jurisdictions, which the previous chapter has endeavored to explore partially.

When the no-fault compensation programs were envisaged, the original purpose was to create a perfect system to substitute the disappointing tort liability system in the area of compensation for industrial injuries. For all these years, this original idea was realized in very few countries. One of the possible justifications might be that there are still some substantial functions of tort liability system that social insurance is not able to replace in workplace injuries and diseases. The distinct roles played by the tort liability system and the social insurance system separately in workers' compensation for industrial damages make it hardly possible for one system to replace the other. This can be traced

back to the distinct rationales of tort liability and social security, thereby involving other differences in functioning, compensation basis, and the objectives of both systems.

Hence, before analyzing the considerations for functions of each compensation system, it seems useful to give a short overview of the philosophical rationales of the different compensation mechanisms.

The most fundamental differences between tort liability system and social insurance system lie in their distinct philosophical rationales. The philosophical foundations of the two remedies can be found in Aristotle's theory of justice,. Aristotle saw justice, unlike other virtues, as primarily social, rather than personal. Rather than focusing on the individual's inner dispositions and character, justice concerns the relationships between individuals in society.[199] He believed that justice operated in two modes or forms, each of which corresponded to an operation. These two modes are termed "corrective justice" and "distributive justice".

Corrective justice features on transactions. Transactions are either voluntary, being consensual transfers by a person of some or all of his holdings to another, or involuntary, resulting from one person depriving another of some or all of his holdings without the latter's consent.[200] Corrective justice, according to conventional wisdom, is the philosophical foundation of tort liability system. The tort liability is based on the correlation between the doer's duty and the victim's right. The tort system, derived from corrective justice, firstly requires that the liability should be imposed based on the tortfeasor's action; secondly, the action should be classified as morally wrong. The wrongfulness as the precondition of imposing tort liability also leads to one essential element of

[199] Hassan El Menyawi, Public Tort Liability: An Alternative to Tort Liability and No-fault Compensation, Murdoch University Law Journal, 2002, Vol. 9, Para 12.
[200] Aristotle, Nicomachean Ethics V, trans. Terence Irwin, 1985, Para 1130 b2.

modern tort system: negligence or fault principle. And another core element is the causation which meets the first requirement of corrective justice. The consequence of the wrongful action of the tortfeasor is to deprive him of some wealth to redress to the victim for damages the wrongful action brings; thereby the transaction of wealth from the tortfeasor is necessary and irreplaceable by anyone else. Only through this way, equality can be restored to the party who had been wrongfully dispossessed of something rightfully belonging to him, either the thing itself or its value. A typical rationale of tort liability system is the liberal individualistic perspective, which advocates the reasonable man within self-autonomy, should be responsible for his wrongful act to another's damage, and on the other hand, according to corrective justice, the sufferer has to stand the agony by himself of the failure to prove the existence of someone's wrongfulness. Obviously, most rationales developed from corrective justice, complimented or criticized, have become the significant features of tort liability system today.

Distributive justice, on the other hand, involves a distribution, whereby a benefit or asset is divided among the members of a group according to some criterion of comparative merit. The criterion is selected for a particular purpose and is applied consistently to all members of the relevant group who qualified for participation in the group. Distributive justice is just, inasmuch as the ratios applied in the allocation are equal. Aristotle called this type of equality "geometrical".[201] Implicit in distributive justice is the notion of social community which ought to be responsible for all its members. And this social view of responsibility directly leads to the emergence of social security or welfare state (social solidarity theory) in the modern age, thereby workers' compensation insurance program as the pioneer of social insurance system becoming more significant to the members of modern industrialized society. Since the basic structure of distributive justice is comprised of: a) the

[201] Aristotle, Nicomachean Ethics V, trans. Terence Irwin, 1985, Para 1131 a29 to 1131 b12.

participants in the distribution; b) the thing to be distributed; and c) the criteria for distribution, therefore the correspondent structure of social insurance program includes: a) coverage; b) funding and c) benefit. Moreover, the crucial feature of workers' compensation insurance program which corresponds to the fatal notion of membership in distributive justice has become the entry of such social insurance: recognition of employment and workplace injury.

As Weinreb comments, the difference of corrective justice and distributive justice relates to the structure by which interactions are ordered by the legal system. "To take a modern example, the legal regime of personal injuries can be organized either correctively or distributively. Correctively, my striking you is a tort committed by me against you, and my payment to you of damages will restore the equality disturbed by my wrong. Distributively, the same incident activates a compensation scheme that shifts resources among members of a pool of contributors and recipients in accordance with a distributive criterion. From the standpoint of Aristotle's analysis, nothing about a personal injury as such consigns it to the domain of a particular form of justice. The differentiation between the corrective and distributive justice lies not in the different subject matters to which they apply, but in the differently structured operation that each performs on a subject matter available to both."[202]

Weinreb's example illustrates the different embodiments of implicit rationales of the tort liability system derived from corrective justice and the social insurance program built upon distributive justice. Such fundamental philosophies that influence tort system and social security system so profoundly even until now are so distinct that the two systems as remedies for personal injuries (industrial injuries included) are thus mutually exclusive from rationale, to concrete institutional arrangement. However, the mutual exclusivity does not mean their incompatibility within a system; on the contrary, it predicts their

[202] Ernest Weinreb, Corrective Justice, 1992, Iowa L. Rev. 403, p 415.

conflicts and victim's rights derived from overlapping recoveries from two remedies.

Given the distinct philosophical rationales of both compensation systems of work-related injuries, it is conceivable that the characters deriving from the rationales vary in workers' compensation systems. The main objectives of the workers' compensation system for industrial injuries and occupational diseases are generally summarized as prevention, compensation, as well as the rehabilitation which have gradually drawn the attention of the Chinese government officials and scholars.

A. Compensation

Obviously, the two compensation systems have at least one purpose in common, compensating for damages in different ways. Under the workers' compensation social insurance program of China, compensation for the victim consists of reimbursement for medical expenses as well as indemnity benefits. Compensation for pain and suffering is not available in social insurance system. There are generally four categories of indemnity benefits, depending on the disability type of the victim: temporary total disability (Disability Degree 7-10), permanent partial disability (Disability Degree 5-6), permanent total disability (Disability Degree 1-4), and benefits following on a fatal accident (burial costs and benefits paid to the family of the diseased).[203] Although these four categories of disability criteria exist in all the provinces and districts of China, the actual level of benefits differs due to the disparity of economic developments among these local areas.

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[203] PRC Regulation on Workers' Compensation Insurance, Chapter 5, Article 29-37. The English translation of PRC Regulation on Workers' Compensation Insurance virtually is from LawInfoChina (http://www.lawinfochina.com), some changes of the translation are made on author's own understanding.

Generally, indemnity payments provide the victim with a certain percentage of gross wages for permanent disability from 90% to 50%, without a maximum determined by the province. For the temporary disability victims, only the total wages of a certain number of months are provided in a lump sum amount. For some injuries, local areas may fix the benefit at a certain amount, for example, RMB 4,000 for a lost ear, meaning that the benefit does not entirely depend on the victim's actual losses.

It needs to be mentioned that until now very little is known about the extent to which workers' compensation social insurance benefits in China has actually protected workers from economic hardships. However, the efficiency of social security system in compensate for industrial victims can be examined from several facets, for example, benefit level, standard, and coverage.

With respect to the benefit level, a comparison of the International Labor Organization (ILO) and China Workers' Compensation Social Insurance Program standards reveals both similarities and especially differences. An abbreviated comparison of some program provisions is presented in Table 5-1. According to the descriptions of the benefit standards, the observation can be made that the benefit level in China is much lower than the basic standards set by ILO considering the workers' compensation social security programs both in developed countries and developing countries throughout the world.

Similarities between the two sets of standards are as follows:

a) The calculation criteria of benefits both depend on the categorization of disability degrees or disease degrees.

b) The maximum periodical total disability benefit should be at least a specified amount; a local area can choose not to place a maximum limit on this benefit.

Important disparities are as follows:

a) As for the coverage of occupational disease, ILO supports all occupational diseases arising out of job exposure to substances or dangerous conditions should be covered, while the standards in China are limited within the prescribed list.

b) With regard to the temporary total disability benefits, firstly, the ILO permits either an earnings-related or a flat benefit depending on which is beneficial to the victim, China always requires an earnings-related benefit. Secondly, ILO permits the periodical indemnity benefits paid monthly to the worker within the period of disablement, China only provides with a lump sum of awards amounting to a few months prior earnings which is substantially lower than ILO standards. Thirdly, the minimum periodical benefit of ILO is the earning of a skilled manual male employee, while China has no such kind of requirement, which means that the benefits received by the victim may be much lower than that of the earnings of a skilled manual male employee. Last but not the least, the duration of ILO benefit is the period of disablement, while China only permits the benefit all at once in the form of a lump sum amount, which cannot secure the quality of victim's daily life during the time when he is laid off and afterwards.

c) With respect to the permanent total disability benefits, it seems that China's standard in this category is a little higher than the average standard of ILO. However, without the right to choose either an earnings-related or a flat benefit as permitted in ILO standards, it is possible for a worker to receive less amount of benefit if his prior earning cannot surpass the wage of an ordinary adult male worker. Moreover, the duration of the time during which the benefit is provided in China is shorter than that of ILO standards. In addition, there are not any benefits provided for the dependents of disabled worker in China, while ILO standards permit some.

d) The ILO sets the permanent partial disability periodical payment equal to the permanent total disability payment times a suitable percentage that depends upon the loss of faculty. China has avoided any free judgments on the proportion of permanent partial disability benefit except for some fixed standards.

e) Apart from the fixed computation of funeral expense of the death benefit in China, the difference between the ILO and Chinese death benefit standards is such that the ILO's has relatively higher standard of periodical payment for the dependent of the deceased over that of China.

Table 5-1 ILO and China Workers' Compensation Program Standards Compared

	International Labor Organization Convention 121	International Labor Organization Plus Recommendation 121	China Workers' Compensation Program
Workers Covered	All workers subject to some exceptions such as casual workers,out-workers, family workers, and other categories whose number cannot exceed a specified percentage; immediate coverage.	Almost all workers including some persons working without pay; immediate coverage.	All workers except some casual labor, domestic service, and the subjected institution and organization of domestic government that a separate compensation program is setting for them.
Accidents and Diseases Covered	Injuries arising out of and in course of employment. Commuting accidents covered unless alternative protection is provided. Listed occupational diseases; minimum exposure required.	Accidents at any place employee would not be except for employment. All diseases known to arise out of job exposure to substances or dangerous conditions.	Injuries arising out of and in the course of employment. Commuting accidents covered without mention of the affection of alternative protection provided. Listed occupational diseases.
Exclusive Remedy	Not mentioned.	Not mentioned.	Not mentioned.
Medical Expense Benefits	Reasonable limits on extent, duration of cost.	Reasonable limits on extent, duration of cost.	No amount limits, but subjected to medicines and hospitals listed.
Temporary Total Disability Benefits			

1. Flat amount or earnings-related	Either	Same.	Earnings-related.
a. Percetage of periodical earnings.	60% (for worker with a wife and two children) of either (1) worker's prior earnings or (2) the wage of an ordinary adult male laborer.	Two-thirds of either (1) worker's prior earnings or (2) average earnings of male workers in most economically active industries.	A lump sum amounting to 12-6 months of prior earnings depending on Disability Degree from 7-10.
b. Maximum periodical benefit	If related to worker's prior earnings, at least the benefit for a skilled manual male emloyee.	Same.	None.
c. Minimum periodical benefit	Required but no amount stated.	Same.	None.
2. Duration.	Length of disability.	Same.	Lump sum all at once.
3. Dependents' benefits.	Reasonable adjustment.	Same.	None.

	International Labor Organization Convention 121	International Labor Organization Plus Recommendation 121	China Workers' Compensation Program
Permanent Total Disability Benefits			
1. Flat amount of earnings-related	Either	Same.	Earnings-related.
a. Percetage of periodical earnings	60% (for worker with a wife and two children) of either (1) worker's prior earnings or (2) the wage of an ordinary adult male laborer.	Two-thirds of either (1) worker's prior earnings or (2) average earnings of male workers in most economically active industries.	75% to 90% of worker's prior earnings depending on Disability Degree 4-1.
b. Maximum periodical benefit	If related to worker's prior earnings, at least the benefit for 100% of a skilled manual male emloyee.	Same.	90% of prior wages of Degree 1.
c. Minimum periodical benefit	Required but no amount stated.	Same.	75% of prior wages of Degree 4.
2. Duration limit	Length of disability.	Same.	Until the time for the worker to get retired.
3. Indexed	Reviewed but not required.	Yes.	No.
4. Dependents' benefits	Yes.	Same.	None.
Permanent Partial Disability			

Benefits			
1. Flat amount or earnings-related	Either.	Same.	Earnings-related.
a. Percentage of periodical earnings	Suitable proportion of Permanent Total Disability benefit.	Same.	50% of prior earnings for worker belongs to Disability Degree 6; 60% of prior earnings for worker belongs to Disability Degree 5.
b. Maximum periodical payment	Suitable proportion of Permanent Total Disability maximum benefit.	Same.	60% of prior earnings.
c. Minimum periodical payment	Suitable proportion of Permanent Total Disability minimum benefit.	Same.	50% of prior earnings.
2. Duration	Length of disability.	Same.	Until when the worker proposes to end employment relationship with the employer.
3. Dependents' benefits	Yes.	Same.	None.

Death Benefits			
1. Funeral Benefits	Yes.	Same.	Yes. 6 months of the average monthly wages of former year of the local area that workers had been working)
2. Income benefits Flate amount or earnings-related	Either.	Same.	Earnings-related.
a. Percentage of Periodical earnings	50% (for a widow with 2 children) of either (1) the deceased's prior earnings or (2) the standard wage for an adult male worker.	Same.	30% to 40% (usually for a widow and children) of deceased's prior earnings which vary from their different closed relationships with the deceased.
b. Maximum periodical benefit	If related to worker's prior earnings, at least 100% of the benefit for a skilled manual male employee.	Same.	Totally benefits for all the dependents cannot surpass 100% of deceased's prior earnings.
c. Minimum periodical benefit	Required but no amount stated.	Same.	30% of prior earnings of deceased.
3. Vary according to who are depends	Yes.	Same.	Yes.
4. Duration of wife's benefits	Life or remarriage.	Same.	Not mentioned.

From the table above, sometimes it is difficult to estimate whether the real protection recovered from social insurance program is able to address the real losses of the injured workers through the over-objective and fixed calculation criteria required to estimate income lost through permanent, partial and temporary total disabilities in workers' compensation laws.

There has been some other criticism as to the computation of the social insurance benefits of the public workers' compensation program in China. One of the reasons for this might be that in many provinces or local districts long term awards (monthly paid benefits for permanent disability and death) have never been indexed to inflation, which may lead to a continuous decrease in the real value of the award received by victims. For example, without consideration of the possibility of the increase of average earnings in Beijing, the social insurance benefits for the victims of Disability Degree 5 to 10 will be higher due to the increase of earnings, while the victims of Disability Degree 1 to 4 can only recover from the same benefits as before. According to workers' compensation laws of Beijing, a 52-years-old injured worker of Disability Degree 5 can recover award amounting to RMB 151,787,[204] a same victim whose injury is heavier for a degree, however, can only recover RMB 105,000 for indemnity benefits from the public program.[205] This leads to somewhat unfair protection of victims suffering from the industrial accidents. The unjust protection also reflects in the unreasonably distinct standards of computation of indemnity benefit in the form of lump sum among different local areas of China. According to the workers' compensation laws, indemnity benefit should be paid in the form of periodical payment from the social insurance funding or paid by the employer if the injured worker who is supposed to attend but did not attend the workers' compensation insurance program. Considering the high rate of

[204] The award (RMB 115,787) for Disability Degree 5 includes a lump sum of disability allowance (40,000), a lump sum of medical allowance and employment allowance (111,787).
[205] The award (RMB 105,000) for Disability Degree 4 includes a lump sum of disability allowance (45,000), a lump sum of medical allowance and employment allowance (60,000).

escaping contributions to the public insurance and other realistic difficulties of enforcement of periodical payment, however, many local areas have permitted shifting such indemnity benefits into lump sums in convenience of enforcement of local regulations of workers' compensation laws.[206] For example, the calculation standards of the shift of benefits in Beijing, Jiangxi, and Chongqing vary substantially. Suppose the same injured worker who ages 45 years old with monthly earning of RMB 1600, and have authenticated as Disability Degree 4, the comparison of the amount of lump sum received by the same victim in three local areas is as follows Table 5-2:

Table 5-2 District Social Insurance Benefit Comparison

District	Beijing	Jiangxi	Chongqing
Lump Sum Amount	RMB 90,000	RMB 160,000	RMB 320,000

According to the numbers above, notwithstanding the varied calculation standards in different areas due to disparity of economic development, such considerable disparity the data above shows, to some extent, reflects the fact that there are some unreasonable problems lying in the computation standards set by the enforcement regulations in local areas of China.

Another reason for the criticism is the fact that benefits tend to ignore the worker's age and career stage, which has led to sort of unfair compensation

[206] The local areas which have such provisions in the local enforcement regulations are such as Beijing, Henan, Hebei, Ningxia, Jiangxi, Shanxi, and Chongqing.

awards received by the victims at different career stages. For example, in Beijing the injured workers separately aged 31 and 49 years old can only recover the same amount of indemnity benefits from social insurance program, when they suffer from the same degree of injuries.[207]

There has also been criticism as to the inadequate compensation for injured workers who cannot be covered by the public social insurance program of China, because the coverage of workers' compensation social insurance program is smaller than the coverage in the cases where PRC Labor Law applies. This results in the fact that many injured workers, who are supposedly protected by PRC Labor Law, have no entitlement to receive compensation from social insurance system. For example, according to Article 2 of the PRC RWCI, the protection scope only includes enterprises and individual businessmen who have employees, while the PRC Labor Law permits covering all the employees working in enterprises, individual economic organizations, government officials, business units and social groups of China. With comparison to the coverage of PRC Labor Law, the scope of PRC RWCI covered in the cases of industrial injuries and diseases is considerably limited. To make up the inadequacy, in 2005 the Ministry of Labor and Social Security promulgated a notice (Ministry of Labor and Social Security 2005 [36]) to extend the coverage of PRC RWCI to the employees who work in the business units, unprofitable private organizations, as well as other business units and unprofitable private organizations which have no financial allocations.[208] However, still a large number of workers have been excluded from the extended coverage of workers' compensation social insurance program of China currently, such as most of the employees working in the government offices, in the military departments in the form of labor dispatch can only stand their injuries or diseases on the job by themselves.

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[207] Beijing Legal Aid and Research Centre, Internal Research Report of Workers' Compensation of China, p16.

[208] See the Notice of Workplace Injury Issues of Workers in Business Units and Unprofitable Private Organization, Ministry of Labor and Social Security 2005 [36].

As discussed above, the relatively low workers' compensation social insurance coverage and benefits, together with the over-fixed but some of the unreasonable computation standards, result in the substantial doubt about the extent to which the social security system in China alone is able to actually protect injured workers from economic hardships. In 2007, the whole system spent approximately RMB 8.8 billion for almost 0.96 million employees who got damaged in the industrial accidents. Little is known about the percentage of this number in the total number of workers who were supposed to get compensated from the public system for their workplace injuries and diseases, but this percentage is estimated as being small due to the deficiency of benefits and coverage provided by the system in current China.

In the case of tort liability system, unlike the public insurance system, it is considered unfair or unjust that someone should suffer a loss that is caused by someone else. As mentioned above in the philosophical rationales, corrective justice demands that the balance of fairness that the defendant has upset by negligence or by creating a risk of injury is redressed.[209] The compensation of tort liability system is corrective and essentially backward-looking: it aims to restore the plaintiff in the position he was in before the tort behavior occurred.[210] Thus, this reasoning implies full compensation the plaintiff can get from the tort liability system including pain and suffering, which can substantially redress the injury or disease on the job of the victim. Furthermore, the full compensation contributes positively to the rehabilitation of the injured worker so that he can recover from the damage and get back to work as soon as possible.

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[209] R.I.R Hoop, Shifts in Work-Related Injuries: An Explanatory Analysis, Shifts in Compensating Work-Related Injuries and Diseases, Edited by Saskia Klosse and Ton Hartlief, Springer, p84.

[210] Peter Cane, Antiyah's Accidents, Compensation and the Law, 6th edition 1999, p359.

Table 5-3 Workers' Compensation Insurance Benefit and Tort Compensation Standards Comparison

	Workers' Compensation Social Insurance	**Tort Liability Compensation**	**Comparison**
Death Benefit/Death Allowance	Lump sum that amounts to 48 - 60 months of average monthly wages of former year of the local area where deceased employees worked.	20 years of average incomes of city or suburb where the court locates; above 60 years old, decrease one year of average income while increase one year old; 5 years of average income for people over 75 years old; if the average income of the place where plaintiff lives is higher than that of the place where the court locates, the former standard is applied.	Time duration of accumulating average income is different. Tort liability is responsible for 20 years, and varies from ages; while social insurance benefits only pay 48-60 months, despite of age difference.
Disability Benefit/ Disability Allowance	Degree 1-4: lump sum (24-18 months of prior wages) + monthly benefit (90% to 75% of prior wage) Degree 5-6: lump sum (16-14 months	20 years of average incomes of city or suburb where the court locates from the day of disability determination; above 60 years old, decrease one year	Time duration of accumulating average income is different. Tort liability is responsible for 20 years, and varies from ages; while

	of prior wages) + monthly benefit (70%-60% of prior wage) Degree 7-10: lump sum amounting to 12-6 months of prior wages	of average income while increase one year old; 5 years of average income for people over 75 years old; if the average income of the place where plaintiff lives is higher than that of the place where the court locates, the former standard is applied.	social insurance benefits only pay 24-6 months, despite of age difference.
Medical Care Payment	All the medical care to cure the work-related injury conducted by the hospitals that were directed in the lists issued by labor administration.	All the expenses which can be prooved by the justification of hospitals; also refer to the clinical and diagnosis records.	Workers' compensation insurance is only responsible for the expenses in the directed hospitals for curing, while tort liability compensation does not have this direction.
Food Allowance	70% of the travel allowance standard paid by employer	Refer to the travel allowance standard of government officials	Workers' compensaiton insurance limits up to 70%, but tort compensation does not set the limitation.
Nutrition Expense	No.	Determine depending on the advice given by hospitals and the injury severity of workers.	Workers' compensation insurance does not cover this type of payment, while tort compensation does.

Care of Living	Living capacity totally lost: monthly paid 50% of local average wage of former year; Living capacity mostly lost: monthly paid 40% of local average wage of former year; Living capacity basically lost: monthly paid 30% of local average wage of former year.	a. Standard: refer to the average standard of local personal caring nurse; b. Duration: until the recovery of living capacity of injured workers; if the recovery is impossible, the maximum time duration is 12 years; c. Degree of caring: depending on the reliance of auxiliary instrument and personal caring nurse of the injured worker.	The monthly payment standard of care provided by workers' compensation insurance is much lower than that provided by tort compensation.
Continuing Medical Payment	If the injury relapses, the payment is the same as medical care payment.	Defendant is responsible for the medical care payment for the continuing 5 to 10 years.	Tort liability compensation sets the time limitation of continuing medical payment provided by defendant, but social insurance does not.
Dependent Allowance	Spouse: 40% of earning capacity of deceased worker monthly paid; Other: 30% of earning capacity of deceased worker monthly paid; Empty nester or orphan: increase 10%	Refer to the average incomes of city or suburb where the court locates depending on the disability degree of injured worker; for dependent younger than 18 years old, calculate until 18 years old; for dependent who	a. Standards are different, and the calculating result of payment provided by tort compensation is much higher than that offered by workers' compensation insurance. b. The workers' compensation

	of the above standard.	has no earning capacity, calculate for 20 years; above 60 years old, decrease one year of average income while increase one year old; 5 years of average income for people over 75 years old	insurance only provide dependent allowance for deceased workers; however, tort compensation also covers the injured workers depite the deceased.
Funeral Expense Benefit	Up to the specified amount that equals to 6 months of the average monthly wages of former year of the local area that workers had been working.	Up to the total amount of 6 months of the average monthly incomes where the court locates.	The calculation result is almost the same.
Earning-related Benefit	During certain period of time, 100% of earlier earning of injured worker paid by employer, and the period is usually no longer than 12 months.	Period of time depends on the proof provided by hospitals; the standard refers to earlier earnings of injured workers. If the injured worker has no stable earnings, calculating according to the average earnings of past 3 years of him. For those cannot provide proof of	The calculation results are almost the same; workers' compensation insurance sets time limitation of 12 months.

		average earnings, refer to local average income standards.	
Travel Expense	Refer to travel allowance standard of original worksites.	Calculate according to the realistic expenses for transfer cure of injured worker and his personal caring nurse.	
Rehabilitation Benefit	Cover the expenses spent on the rehabilitation medical types in the workers' compensation insurance medical list, and the workers must go to the hospitals that have service contracts with local social insurance administrations.	The plaintiff can file another tort claim to recover the expenses spent on organ function rehabilitation, appropriate plastic surgery, etc.	The rehabilitation types of medical care covered by social insurance are within the limitation of certain lists; while tort compensation for rehabilitation expenses almost cover all the realistic expenses, but highlight the "appropriate" ones.
Spiritual Loss	No.	Cover some non-economical losses according to Supreme Court Judicial Interpretations of Civil Tort Spiritual Loss Compensation.	This type of compensation is what the social insurance benefit does not cover, and tort compensation does. And this is a significant reason why many injured workers tend to choose tort claim over social insurance.

An abbreviated comparison of the workers' compensation insurance benefit and the tort liability compensation standards according to related provisions in China is presented in Table 5-3, which reveals the substantially higher standard and larger amount of compensation from tort liability claim over workers' compensation insurance benefits.

Not only can the victim on the job recover full compensation from the tort liability system with much higher standards of benefits, but also it balances the corrective justice of punishing the real wrongdoer. And sometimes, what the victim wants most is the real justice which makes the wrongdoer apologize and pay to serve the personal as well as to keep society safe through filing claims. However, on the other hand, it also entails important limitations. Indeed, whether it concerns strict or fault liability, some sort of shortcoming or failing on behalf of the defendant will have to be proven in order to make him pay for the losses.[211] Irrespective of its other virtues, the tort system is an expensive, time-consuming form of dispute resolution. A large proportion of all compensation money goes to lawyers and legal expenses, and the situation will get worse notably for the injured workers who may have no earning sources due to incapacity of working during the tort claims. Although there has been an increase of the civil representation in the grass roots of China due to the soaring consciousness of law suits in these years, the help can only cover a tip of the iceberg. There are still millions of victims who have to face the extraordinarily high attorney fees and time costs of tort claims in China.

Such kind of restrictions or limitations found in the tort claims stated above is far less evident in the case of social security law. The barriers to enter the system are much lower in the workers' compensation social insurance program of China. The entrance of social security system lies on the foundation of a social view of responsibility to spread the risks as widely as possible to the

[211] Peter Cane, Atiyah's Accidents, Compensation and the Law, 6th edition 1999, p359.

whole society or group of the potential employers. Furthermore, the costs of entering a workers' compensation social insurance program is much lower than that of filing a tort claim in China, since the representation expenses and costs for losing a suit are not an issue to worry about. Moreover, if the victim is covered by the social insurance of industrial injury and disease, he does not have to take the risk of going uncompensated by proving that his injury or disease is related to the job. What's more important, the compensation benefits from social security system will not be substantially reduced when the employer can demonstrate that the injured worker was also partially at fault.

As the above analysis of the advantages and limitations of the compensation served by the tort liability system and social insurance program in China shows, both systems clearly have a compensation function in a specific manner. Still, the presented justifications and examples are different and the compensation differs in character: tort liability law offers full compensation once strict conditions are met; social insurance offers an easier access but at a lower compensation level. Therefore, it is very likely to see that both public and private compensation systems are able to play some significant roles, as well as a few negative effects in compensating the victims of workplace injuries and occupational diseases currently in China. Further, the merits and demerits of them can somewhat make up for each other, which may lead to the conclusion that an elaborated combination of both systems may solve the realistic problems of workers' compensation in a better way by gathering the advantages as well as avoiding the disadvantages of both systems at current stage of China.

B. Prevention

Apart from compensating for industrial damages, workers' compensation system is generally also associated with the other significant function of

prevention or deterrence in China. Prevention is evidently of great importance in relation to industrial accidents, and is also a significant criterion to measure the efficiency of a compensation system.

While originally social policy was confined to or mainly focused on compensating for damages, more and more attempts are made to equally concentrate on repairing and even preventing damages.[212] From the perspective of personal responsibility, prevention is supposed to be a main objective of the tort liability system, since prevention or deterrence especially comes to the fore in connection with liability rules. Derived from the corrective justice, the basic idea is that the prospect of having to pay damages for injuries caused by particular conduct will deter people from engaging in conduct of that type.[213] This theory of affecting human behavior is usually taken as the starting point of economic analysis of law.

It is apparent that the tort system, by linking liability to pay compensation with responsibility for causing accidents, may, to some extent, further the goals of general deterrence.[214] Still, as Cane and other tort law scholars rightly points out, the general deterrence potential of tort law is also limited.[215] First of all, the prevalence of liability and first party insurance greatly reduces the deterrent potentiality of tort law since commercial insurances are a possibility to spread the risk and distribute losses.[216] A second limitation of tort liability system is the fact that the concept of 'causality' as it exists in civil liability not always or automatically coincides with the basic assumption of the theory of general deterrence that holds that accident costs should be borne by the person who can

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[212] See R.I.R Hoop, Shifts in Work-Related Injuries: An Explanatory Analysis, Shifts in Compensating Work-Related Injuries and Diseases, Edited by Saskia Klosse and Ton Hartlief, Springer, p85.
[213] See Peter Cane, Atiyah's Accidents, Compensation and the Law, 6th edition 1999, p361.
[214] See R.I.R Hoop, Shifts in Work-Related Injuries: An Explanatory Analysis, Shifts in Compensating Work-Related Injuries and Diseases, Edited by Saskia Klosse and Ton Hartlief, Springer, p86.
[215] See Peter Cane, Atiyah's Accidents, Compensation and the Law, 6th edition 1999, p383-384.
[216] See Peter Cane, Atiyah's Accidents, Compensation and the Law, 6th edition 1999, p368.

most cheaply avoid accidents of that type in the future.[217] Apart from that, another limitation might be found in the modernization of industrial production which results in the fact that most large-scale industrial disasters can not attribute to someone else directly, because the reason for its happening is nobody's fault but the 'god's hand'.[218]

Whether, in practice, tort law is indeed an efficient instrument to deter wrongdoing is still highly debated in the theoretical arenas of other jurisdictions throughout the world. Coming down to the ground, the empirical data or information is difficult to find, if ever exists, of the deterrence function of tort liability system in China. Since the first party and third party private insurances are far less prevailing in contemporary China as in western countries, the conflict brought by the tort liability system with the compensation goal has not arisen as evidently as it appears in western countries, and such conflict on the contrary just served by the availability of insurances.

The social security system and safety regulation which appear to be the alternatives to the tort liability system in the area of industrial injury and disease have been discussed extensively in the jurisprudence and law and economics literature. No-fault systems and social security are not likely to have any deterrent effects unless the financial contributions to these systems are made dependent on factors relating to the accident risk or unless they are combined with some form of safety regulation.[219] The non-deterrence argument not only applies in particular to the case of social security, which is generally considered as providing with the basic entrance (accident victims do not need to prove fault to receive compensation) , but also applies in the case of safety regulations or

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[217] See Peter Cane, Atiyah's Accidents, Compensation and the Law, 6th edition 1999, p376.

[218] See R.I.R Hoop, Shifts in Work-Related Injuries: An Explanatory Analysis, Shifts in Compensating Work-Related Injuries and Diseases, Edited by Saskia Klosse and Ton Hartlief, Springer, p89.

[219] See N.J. Philipsen, Prevention and Compensation of Work Injury in the United States: An Overview of Existing Empirical Evidence, Shifts in Compensating Work-Related Injuries and Diseases, Edited by Saskia Klosse and Ton Hartlief, Springer, p202.

public social insurance programs, where lie many practical enforcement problems in China.

In practice, the social insurance program and safety regulations of China tend to be weak in the actual effects of preventing industrial injuries, occupational diseases as well as other detrimental actions.

As has been analyzed slightly in the realistic problems in Chapter 3, the introduction of the risk floated workers' compensation social insurance program, on the contrary, encourages many Chinese employers, especially small ones, to turn to escape from the legal obligations towards their workers when industrial accidents occur. Since these irresponsible employers' ignorance of contributions to social insurance funds is just the same as their ignorance of the safety of working environments and professional training for their workers, there may be a causal link between the low coverage of workers' compensation social insurance and low preventive effects of social security program in China.

The low coverage of workers' compensation social insurance program which nearly equals to the low preventive function of social security system derives from a number of aspects. Firstly, it results from the gentle punishment given to the avoiders of compulsory social insurance, which encourages the fact that the employers take the illegal behaviors for granted instead. According to Article 2 of the PRC RWCI, for certain employers in China, it should be a compulsory legal obligation to contribute to social insurance program for industrial injury and occupational disease. The punishment given to the irresponsible employers can be summarized as follows: a. for employers who have not made the contributions according to the law, the labor and social security administrations should order them to make corrections; b. in the serious case of evasion of contribution, the people who are in charge or other people involved should be imposed a fine amounting from RMB 1000 to 5000; c. in the extremely serious case of evasion, the imposed fine should be amounting from

RMB 5000 to 10000;[220] d. in the case that employers refuse explicitly the contributions, the labor and social security administration or taxation administration should apply for the people's courts to enforce the payment.[221] Obviously, the fine for evasion of contribution, judging from current economic development especially in large cities of China, is too gentle to play the punishing role. Moreover, the order of correction can even barely be considered a form of punishment.

According to the PRC RWCI, for the employers who have succeeded in evading the contribution, all the medical costs and indemnity benefits should be paid by the employers by reference to the social insurance standards.[222] In practice, however, the compensation which hardly appears to be the punishment paid by irresponsible employers is usually given up by the victims on the job due to the unequal bargaining power between employers and employees, high costs of proceedings economically and timely. Many victims finally are forced to accept 'private resolution' with their employers for only a small proportion of benefits which they are supposed to recover from irresponsible employers. Sometimes, a number of employers even intimidate the injured workers to accept the 'private resolution' by delaying their medical payments which are urgently needed to save lives.[223] Tens of thousands of employers will choose to take the risk if they have ever evaded the contribution and succeeded in forcing injured workers to come to 'private resolution' by taking advantage of other unreasonable loopholes of workers' compensation laws of China. As a result, the inappropriate provisions of punishments make victims of industrial injuries and occupational diseases take the responsibilities of uncompensated or less compensated instead of attributing the fault to irresponsible employers.

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[220] See Article 23 of the Temporary Ordinance of Social Insurance Fund Contribution.
[221] See Article 26 of the Temporary Ordinance of Social Insurance Fund Contribution.
[222] See Article 60 of the PRC Regulation of Workers' Compensation Insurance.
[223] See Beijing Legal Aid and Research Centre, Internal Research Report of Workers' Compensation of China, p8.

A second reflection of the low preventive function of social security system of China may lie in the fact that the employers still have to pay to the victims a relatively large proportion of benefits on their own, apart from the benefits recovered from social insurance program, even if they attend the workers' compensation program. According to the benefits of workers' compensation social insurance program in China, for the industrial injury or occupational disease from Disability Degree 5 to 10 (including 5 and 10), despite the awards from workers' compensation social insurance funds, a substantial part of benefits has to be recovered from employers. Although no data about how many industrial injuries and occupational diseases between Degree 5 and 10 nationwide can be found, the statistics of Beijing Legal Aid and Research Centre dealing with the workers' compensation cases are of great significance in estimating the number from a certain aspect. Table 5-4 shows the percentages of some ranges of industrial injuries or occupational diseases of all. According to the numbers, the observation can be made that there are 169 cases of workplace injuries from Disability Degree 5 to 10, which take 80.1% of the cases that are able to be identified and 51.4% in the total number of cases that have been dealt with by the Centre.

Table 5-4 Percentages of Some Ranges of Industrial Injuries or Diseases

Type of Workplace Injury	Number of Cases	Percentage 1[224]	Percentage 2[225]
Death	17	8.1%	5.2%
Disability Degree 1-4	16	7.6%	4.9%
Disability Degree 5-6	13	6.2%	4%
Disability Degree 7-10	156	73.9%	47.7%
Very Slight	9	4%	2.7%
Non-Indentified	56	——	17%
Non-Authenticated	62	——	18.8%
Total	**329**	**100%**	**100%**

Source: Internal Research Report of Workers' Compensation of China

[224] Percentage 1 represents the percentage of each type of workplace injury cases take in the cases that can be identified and have already been authenticated by the medical expertise, which amounts to 211 cases excluding the Non-Identified and the Non-Authenticated.

[225] Percentage 2 represents the percentage of each type of workplace injury cases take in all the cases which amounts to 329 in total.

Complying with the social insurance benefits for the workplace injuries which belong to Disability Degree 5 to 10, workers' compensation social insurance program funds cover medical cost, expense for authentication of disability and the lump sum of indemnity award; while other medical costs that are not listed, earning during waiting period, expense for care of living and for food in hospital, disability allowance, a lump sum for medical and employment indemnity benefits should be paid by the employer.[226]

Take an injured worker of Disability Degree 8 in Beijing for example, Table 5-4 shows the amounts of compensation recovered from social insurance funds and employers separately as social security benefits and the computation according to the 2008 Beijing workers' compensation social insurance standards. According to the numbers, it can be concluded that more than 60% of the social insurance benefits a victim received comes out of the pocket of employers, even if the employer has contributed to the public program. And this might be one of the reasons leading to Chinese employers' low incentives of attending social insurance program, thereby indirectly resulting in the weak preventive function of social security system of China.

[226] See Article 29, 31, 34 35 of PRC Regulation of Workers' Compensation Insurance.

Table 5-5 Comparison of Benefits Recovered from Social Insurance and Employer

Type of Benefit	Recovered from Insurance Funds	Recovered from Employers
Listed Medical Costs	Amount: RMB 27,000 Computation: Listed medical cost is the medical types in the Workers' Compensation Medical List, Workers' Compenstion Insurance Drug List and Worker' Compensation Hospital Service Standards; Suppose total medical cost is 30,000, social insurance covers 90% of it.	
Disability Allowance	Amount: RMB 22,356 Computation: Ten months of prior earnings which cannot be lower than 60% of Beijing average earning.[227]	
Authentication Payment	Amount: RMB 200	
Unlisted Medical Costs		Amount: RMB 3,000

[227] 2008 Beijing average earning is RMB 3,726 per month. 3,726*60%=2,235.6, 2,235.6*10=22356.

	Computation: According to the suppose of medical costs above, 10% of total medical costs that may not on the lists should be covered by employers.
Earining of Waiting Period	Amount: RMB 13,413.6
	Computation: According to Beijing Categorization List of Earning of Waiting Period, waiting period of 6 months.[228]
Care of Living	Depending on need.
Food in Hospital	Amount: RMB 525
	Computation: for employees who have the standards, 70% of that standards of traveling food; for employees who do not, the mediation committee or court usually uses Travel Food Standard of Beijing Government Official which is 50 per day.[229]
Medical and Employment Indemnity Benefit	Amount: RMB 55,890
	Computation: for the victim who proposes to end labor

[228] 2009 Beijing Categorization List of Earning of Waiting Period (Temporary Enforcement), 22,35.6*6=13,413.6.
[229] 70%*50=35, Suppose the injured worker is in hospital for 15 days, then 15*35=525.

		contract, the employer should pay for indemnity benefits for medical care and employment in the form of lump sum. According to Beijing workers' compensation enforcement standards, 15 months of average earnings of former year of Beijing should be paid by employer.[230]
Total	49,556	72,828

[230] 3,726*15=55,890.

The law-and-economics literature is clear in defining the goal of a liability system for industrial accidents: Such a system should minimize the sum of accident costs and prevention costs.[231] Thus, the liability system (with high deterrent function) should be designed in such a way that it gives incentives to employers and employees to prevent those accidents for which prevention costs are lower than accident costs.[232] The author already discussed the extremely low accident costs Chinese employers would pay which will hardly surpass the prevention costs under the way they deal with social insurance program for workplace injury. In other words, notwithstanding the risk-rated premium, workers' compensation social insurance program seems to play slightly negative role in deterring workplace accidents and occupational diseases in China.

In addition, it tends to disagree on the actual preventive effects of the current and past safety regulations in China. The safety regulations in China have had little preventive role in reducing the number of accidents. The data presented in Table 4-2 of Chapter 3 shows that throughout the past five years work safety accidental death rates have been decreasing in all industries in general and in certain industry such as mine, but this decline can barely be credited to safety regulations of China. On the contrary, there seems to be no evidence of any additional effects of regulatory policies on this downward trend.

Enforcement is very much centralized in the preventive function of the safety regulations in China. That is, the enforcement of the standards in PRC Production Safety Law and Ordinance of Labor Security Inspection should be guaranteed by thousands of local Labor Inspection Administrations through random inspections of workplaces along with targeted inspections in exceptional

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[231] P.M. Danzon, JR&I, 1987, p264, argues that the social costs associated with accidents have four sources: prevention costs; the costs of compensating injuries; litigation, enforcement and other overhead costs; and the disutility of uninsured risks.

[232] See N.J. Philipsen, Prevention and Compensation of Work Injury in the United States: An Overview of Existing Empirical Evidence, Shifts in Compensating Work-Related Injuries and Diseases, Edited by Saskia Klosse and Ton Hartlief, Springer, p209.

cases. Also, workers have the right to file complaints with Labor Inspection Administrations, but they rarely do this due to the lack of information and threats of employer reprisal. Another problem which is much bigger is that Labor Inspection Administration's enforcement capabilities have always been low, and today it even has inadequate staff to take charge of all zones where intensive working sites locate, while the number of workplaces has grown. In a recent internal research report of workers' compensation in China, the author states that 'in the cases to which Beijing Legal Aid and Research Centre has given legal aids, the inspectors of Labor Inspection Administration are barely seen. As is the case with a large variety of legislation, the statutory intent of Labor Inspection Administrations does not necessarily correspond directly to the day-to-day reality in the workplace, which leads to insecurity of working safety. Meanwhile, it will decrease employers' consciousness of preventing industrial accidents.'[233]

As for the prevention function, tort liability system seems to play relatively positive role in deterrence. The deterrence of workplace accidents comes mostly from the tort liability system only if the system can succeed in offering incentives to employers to prevent industrial accidents or occupational diseases for which prevention costs are lower than accident costs. However, current workers' compensation social insurance system can hardly achieve this goal since it fails to supply with such incentives owing to a large variety of unreasonable provisions and other loopholes such as standard setting and fines of workers' compensation laws in China. Only the introduction of risk-related premium can save slightly some positive preventive incentives for public social security system. Furthermore, the safety regulations cannot change much about the deterrence of work safety accidents due to labor safety and inspection administrations' ineffectiveness to back-up the ambitious enforcement regime

[233] See Beijing Legal Aid and Research Centre, Internal Research Report of Workers' Compensation of China, p19.

with inadequate funding.

Supported by the conclusion drawn from the study of Chapter 4 concerning the relationship between tort system and social security system in workers' compensation systems in some western countries, as analysis of the compensation and prevention functions of tort liability and social insurance of China above, the answer of the first question may not be hard to find. As just discussed, an elaborated combination of a workers' compensation social insurance system and the tort liability system may provide a solution to many problems arising from workplace injury and occupational disease in the sense that then both compensation and deterrence are, in China, encouraged. Also, safety regulations can and should be combined.

II. PUBLIC SOCIAL INSURANCE SYSTEM SHOULD PLAY DOMINANT ROLE

Since combination is necessary of tort liability and public security in the compensation of industrial injuries and occupational diseases in current China, a question then arises as to how to make a balance between the private responsibility and social solidarity in workers' compensation system. In other words, what considerations can be drawn with regard to the way in which the compensation of damage arising from work-related injuries and diseases is arranged between public social insurance program and the tort liability system in China. The public social insurance system and the private tort liability system cannot be arranged equally or in the paralleled way in the broader workers' compensation system. The efficiency of compensation for workplace injury and occupational disease reaches highest, only if one of the compensation systems leads the way while the other follows as a complement.

Hence, the discussion of the practical reasons and arguments that may have inspired the dominant role of social insurance system compared to the tort liability system with respect to the compensation of work-related injuries in China is the topic of this section.

As has been shown in the findings presented in the previous chapters, there has been a shift from private system to public system in the way which the damage deriving from work was compensated. After the two world wars, people began to realize the great significance of social security system. Developed industrialized countries took the lead in building up public social security systems against diseases relating to old ages, industrial injuries and other threats brought by modern society. Compared with the social security law, the tort liability system seemed unable to win the applauses of people in the field of workers' compensation. Given the expansion and development of no-fault compensation and social security system, many scholars paid more attention to the future of tort law, some of them felt sad about the comprehensive workers' compensation scheme of New Zealand, even some predicted the fall of tort liability in the 21 century.[234] And a number of arguments and reasons can be put forward to the observations or predictions above. Despite the pros and cons of the abolishment of tort liability in workers' compensation system, the fact is that tort liability is still an indispensable remedy in the compensation of industrial injuries and diseases nowadays. However, the difference is that tort has been shifted to the complementary seat from its original premier position in the way of compensating damages deriving from work. And until now, the public social security systems in many industrial countries play the dominant role in this domain, in spite of the economic constraints of the over expansion of social

[234] A famous German tort lawyer even asked, "ob dem Deliktsrecht nicht das Sterbeglocklein gelautet werde" ("whether tort law was not doomed to die"). See Ulrich Magnus, The Impact of Social Security Law on Tort Law, Tort and Insurance Law Vol.3, Springer Wien New York, 2003, Introduction. For more negative view towards the role played by tort liability in the compensation system for personal injury, see Stephen Sugarman, Doing Away with Personal Injury Law: New Compensation Mechanisms for Victims, Consumers and Business, 1989, Quorum Books. .

security system in some of them.

From the private tort law to the public social security law, the trend of balance and conjunction of private law and public law has been revealed.[235] Professor Wang Zejian has pointed out that "tort liability has really comes to the 'crossroad': to obsolete tort liability in the domain of personal injury and to depend on social security system in the compensation of victims; or making tort system and social security system co-existing as a comprehensive compensation system with tort liability as a 'little pal' of social security; or maintaining the current situation of tort law, we have to make a choice."[236] Hence, re-adjustment of structure of workers' compensation system, to some extent, implies the requirement of modern society which gives greater importance of the social security system over the tort liability system in compensating industrial injuries and diseases. The compensation systems initiated by each country depending on their economic development can be roughly summarized as having gone through the pattern from reversed pyramid to balanced square, and to pyramid.[237] The diagrams below show the smaller proportion of tort law and correspondingly larger proportion of social security law in the compensation system of workplace injury and occupational illness. The pyramid or triangle which is the most stable figure implies the reasonable structure of the compensation system to some extent.

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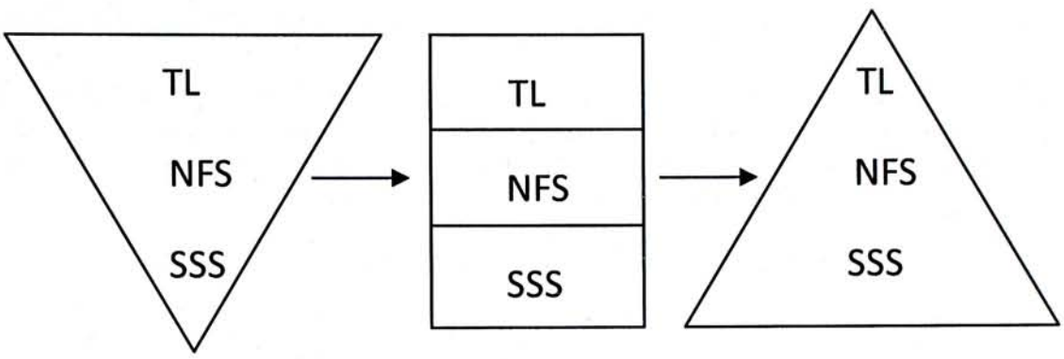
[235] See Zheng Shangyuan, Research of Workplace Injury Insurance Law and System, Peking University Publishing House, 2005, p30.

[236] See Wang Zejian, Tort Law, Chinese Law and Politics University Publishing House, Volume 1, 2001, p68.

[237] See Wang Zejian, Tort Law, Chinese Law and Politics University Publishing House, Volume 1, 2001, p36.

Chart 5-1 Compensation Structures for Work-related Injury



TL= Tort Law
NFS= No-Fault System
SSS= Social Security System

What is different is that China has not experienced the shifts above as many western countries have been through over centuries. However, China should follow the trend examined by other modern industrialized countries in the western world. The experiences concluded from the former chapter could help China to avoid some policy mistakes that other countries have made in the domain of compensating workplace injuries and occupational diseases.

Given the differences between compensation systems, shifts from one system to another will not be as a rule made arbitrarily.[238] On the contrary, in particular with regard to the significant policy changes, such as the real shifts that constitute the actual subject of the shifts-project, one may assume that the various peculiarities of compensation systems precisely constitute the main

[238] R.I.R Hoop, Shifts in Work-Related Injuries: An Explanatory Analysis, Shifts in Compensating Work-Related Injuries and Diseases, Edited by Saskia Klosse and Ton Hartlief, Springer, p87.

cause to consider a change.[239] This also means that the reasons given to justify a shift of the dominant position from tort liability to social security will probably not only refer to the expectations one has faced the future compensation system, but may also reveal the deficiencies of the former system and the elements on the basis of which it was judged unsatisfying from a certain moment on. The table below shows the evaluations of functions of both compensation systems of work-related damages, from which the dominant place of workers' compensation social insurance program was envisaged to replace the tort liability system.[240]

[239] R.I.R Hoop, Shifts in Work-Related Injuries: An Explanatory Analysis, Shifts in Compensating Work-Related Injuries and Diseases, Edited by Saskia Klosse and Ton Hartlief, Springer, p87.

[240] R.I.R Hoop, Shifts in Work-Related Injuries: An Explanatory Analysis, Shifts in Compensating Work-Related Injuries and Diseases, Edited by Saskia Klosse and Ton Hartlief, Springer, p88.

Table 5-6 Functions of Tort Liability System and Social Security System

Functions	Liability Law (Tort)	Social Security
Compensation	Yes, corrective (losses) • full compensation • high thresholds (causality)	Yes, redistributive (needs) • limited in time and scope • low thresholds (irrespective of cause; solidarity)
Prevention	Liability rules as incentives for careful behavior (cf. Law & Economics): a) *fault*-: standard of care is given; evaluation by a judge b) *strict*-: standard of care to be evaluated by the employer BUT: limitations! 1. Because of insurance possibility (conflict compensation-prevention) 2. Causality：possibility to avoid costs the cheapest way possible 3. High administrative costs 4. No social losses in calculation 5. Not all accident costs taken into account	Very limited: 1) Primary goal = compensation 2) Central role for principle of solidarity Possibilities with regard to work-related injuries: via premium differentiation, rehabilitation efforts

Spreading of risks	Yes, especially due to insurance possibility (collectivity of insured)+transfer through the market (consumers/ employers/ share-holders)+ on government (via deductible expenses)	Yes, because of solidarity mechanisms (premiums and benefits) and principles of spreading! Going from a limited group of employers to all residents
Cost allocation	Yes, strict liability	Not clear: maximum spreading (departure when premium differentiation)

In spite of some fundamental distinctions of the functions of both compensation systems deriving from different legal systems within the western world, most of the evaluations in the diagram above also apply to workers' compensation system in China. Adopting a long-term and international perspective, workers' compensation system in China should be envisaged to meet more of social purposes to strengthen the social compact. According to the PRC RWCI and Labor Law, the whole workers' compensation system serves mainly three privotal social purposes[241]: a. by promptly providing workers with medical and disability benefits and establishing with reasonable certainty employer liability, it cushions the effects of work-related injury and illness; b. by requiring employers to pay compensation, it forces them to incorporate the costs of work-related injuries and diseases into services and goods, thereby creating a significant incentive to improve occupational health and safety conditions; and c. by delivering no-fault benefits through an administrative process, workers' compensation is designed to create a relatively litigation-free system, permitting the delivery of benefits with low administrative costs.

Judging from the social aims of workers' compensation system, social insurance system for workplace injuries and diseases serves all the traditional functions above. Especially in China, most of victims suffering injuries and diseases deriving from industrial accidents are still on the most primitive stage of basic needs instead of full compensation provided by tort liability system. The social security system, like a powerful guarantee, protects injured workers and their dependants to obtain the secure awards from public insurance funding. A special characteristic of China is that most of the workers who perform highly risky jobs or easily to suffer from industrial injuries are the people who live in the lowest class or grassroots of Chinese society. For them, the secure awards for the injuries or diseases arising from work sometimes mean the most precious money to save their lives. In other words, the social security compensation

[241] See PRC Regulation of Workers' Compensation Insurance, Article 1.

system takes the precedence over tort liability to serve the function of maintaining social stability at the same time. Furthermore, the distributive justice and social view of responsibility deriving from social security meet the aim of strengthening social compact of modern society. In addition, the low threshold and stable benefits of public insurance can help some of victims to give up the entitlements of further tort claims, thereby relieving the burden on the shoulder of judicial institutions of China.

Given the primary place of social security compensation, Chinese society as a whole benefits from justice for workers, the elimination of a source of worker-employer conflict, improved occupational safety (more from tort liability), reduced litigation, and the protection of the public treasury from the claims of disabled workers and the survivors of the victims of industrial accidents.

On the contrary, despite the modernization of tort law, the essence of tort litigation still makes tort system unsuitable for being the premier remedy for victims of workplace injuries and illnesses. Today, the 'unholy trinity' has been overturned. However, the costs, delays, uncertainty and wastefulness of litigation which were major concerns at old time are even more powerful concerns today.[242]

Legal representation is necessary to file tort claims which increases the difficulties of injured workers to get access to tort compensation system, in particular for the grassroot victims. No matter how much involvement and claim controversy within social insurance program have grown, the administrative costs of workers' compensation social insurance program are dwarfed by the costs of tort litigation. Irrespective of its other virtues, the tort system is an

[242] R.I.R Hoop, Shifts in Work-Related Injuries: An Explanatory Analysis, Shifts in Compensating Work-Related Injuries and Diseases, Edited by Saskia Klosse and Ton Hartlief, Springer, p 92.

expensive, time-consuming, and inefficient form of dispute resolution. As a result, this makes tort system a luxary resource for most victims thereby not the first choice right after the accidents occur.

Further, litigating a tort claim certainly takes longer than processing the vast majority of workers' compensation social insurance filings. During the pendency of the case, the worker, who may be unable to work, will go uncompensated, and the pressure to win some financial support during the period of disability may intensify their poor economic situations. In China, the soaring number of labor dispute cases these years has become a substantial burden of judicial institutions, which leads to the terrible time delays of tort litigations about labor disputes cases. The result deriving from it is a great number of poorer workers to settle for far less than their claims are worth. The delays that accompany litigations would also draw back the time returning to work, thus both interfering with the recovery of individuals and worsening the productivity loss for the economy as a whole.

Moreover, since fault is still the essential factor in establishing workers' claims to tort compensation, many of victims would face the risks of uncompensation. Still others will have their compenstion substantially reduced when employers can demonstrate that workers were also partically at fault. Therefore, if tort compensation system were put forward before social security, the high possibility of getting uncompensated and sub-compensated would commit the wastes of social resources and leave some workers and their families entirely without support in paying medical bills meanwhile.

Therefore, in spite of the modification and modernization of tort law, tort litigation is still an expensive gamble in China. Its weaker effect and lower efficiency in comparison with social insurance system for assuring certain ammount of compensation for injured workers still makes itself supplementary.

In the previous chapter, the author briefly analyzed the global trend of workers' compensation systems which China might follow properly, and went into the underlying reasons for the shift of compensation roles of tort liability and social insurance. With considerations of some realistic problems lying in the workers' compensation system of China, the discussions above underpin the answer of the questions arisen in this section further. From the standpoint of government policy making, as well as the perspective of injured workers, social security compensation system should always play the dominant role and take the first place in compensating victims on the job in current China. Moreover, modern tort liability system is an independent element of Chinese broader workers' compensation system. Without the back up of tort liability system, the maximized functions cannot be served by the workers' compensation system in China with single remedy of social security.

III. DOUBLE COMPENSATION NOT PERMITTED

Whether cumulated compensation or double recovery is permitted is on the debate in the domain of workers' compensation. Since tort liability and social security can coexist in workers' compensation of China, and social insurance should be considered as the premier remedy, then are injured workers allowed to accept full compensation from tort system after they recover from social insurance system? The answers must vary in accordance with concrete considerations of different jurisdictions. Hence, the question needs to be answered in consideration of the realistic situations of China in this section.

In the academic arena of workers' compensation, owing to the significance of this question in the arrangement of workers' compensation structure, the

debating hotpot has never cooled down. The interpretations of double recovery differ without unified criteria. Some interpret as the duplication of remedies, some believe as the double amounts of compensation benefits from different remedies; still others argue that 'double' means the duplication of types of benefits covered by two compensation systems. Therefore, the arguments deriving from non-unified interpretations given to support different answers to this question diversify among scholars. Generally, despite the diversified arguments views can be divided into two sides as the pros and cons of double compensation in China. In this author's opinion, theoretically double compensation from both remedies is not unreasonable, but considering realistic problems, it should be barred in practice of compensation for industrial injuries and occupational diseases in current China in the long run.

Theoretically, it should be held that there is no conflict between the tort liability system and the social insurance program in the domain of workplace injury compensation. As analyzed above, tort liability compensation and workers' compensation social insurance system are based on different claims. As discussed above, due to distinct philosophical rationales, tort liability depends on the wrongdoer's fault or negligent behavior which leads to the damage of victim on the job, while social insurance program is based on the employment relationship between the injured worker and the employer, which entitles the injured worker to recover from public insurance funding as a member of the labor force. Therefore, the compensation basis of the two systems appears entirely distinct.

The compensation basis means the entitlements for the injured worker to rest upon and other preconditions for the injured worker to meet with if he wants to recover from either remedy. As to the basis of liability in tort system, it varies in accordance with concrete rules of different countries. Usually, three elements appear most frequently in tort liability: damage, fault and causation. Professor

Wang Liming notes that there is no one criterion which is invariably present in every tort.[243] In the fault-based tort liability, three of the elements are all required, while in the strict liability and equity-based tort liability, fault is not the necessary factor.

According to the PRC RWCI, the claim basis for workers' compensation insurance benefits generally includes damage and causation. The common basis for tort system and workers' compensation social insurance of China are damage and causation. However, different meanings and contents lie in the separate elements of the two remedies.

Civil rights protected by Chinese civil law generally can be categorized into the right of property, right of living and health, and spiritual rights. Correspondingly, the damages subject to tort claims include the property loss, bodily injury, and other non-pecuniary loss i.e. damages of pain and suffering. Workers' compensation insurance system aiming at guarding workers' social security right resting on the basic standard of living only compensates the damages related to bodily injury, illness and death. Therefore, any worker's pure claim of spiritual damage or financial loss on the job for social insurance benefits will not obtain support of workers' compensation insurance program of China.

Apart from the different damages covered by the two compensation systems, the causations of tort liability system and workers' compensation social insurance program differ in many ways. The causation of liability in tort system means the direct or not-too-remote link between defendant's act and claimant's damage. However, the causation in workers' compensation insurance of China makes the injured worker obliged to prove that the bodily injury is arising out of or in the course of work. This link with work can be understood as composing of

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[243] Wang Liming, Min fa: qin quan fa, 民法：侵权法, Civil Law: Tort Law, Beijing: Chinese People University, 1993, p245.

two relationships. One is the existence of the relationship between the injured worker and the employment. According to the procedural provisions of workers' compensation insurance program,[244] when an incidence has occurred in a work site, it needs to be determined that there is a relationship between a worker and the employment before the worker can claim for workers' compensation insurance benefits. And the causation in workers' compensation is also reflected in its reliance on the relationship between the worker's injury and work. It means that a worker's employment has to contribute to some extent to the injury before the worker is entitled to insurance benefits. The extent of contribution is vague in the legislation of workers' compensation of China, but it is of great importance to the determination of workplace injury. Usually, injuries which occur on work premises during working hours are easily identifiable as occurring at work; however it is not simple to determine whether or not a worker was at work when injured. The perception of the general criteria of this causation can be: within the work time (including before and after work time); within the work site (commuting to and from work site included); and due to work requirement (i.e. work related travel).

From the discussions above, it can be concluded that double recovery does not mean to recover through both compensation channels which repeatedly compensate the injured workers because the different claim foundations provide with victims entitlements discretely. The implication would be that getting double recovery does not simply mean the duplicated numbers or types of compensation received from the two remedies which surpass the real needs of victims. "There is not any problem with the tort liability of wrongdoer after the victim gets social security benefits. However, this will not justify the reasonableness of double recovery from legal logic; because double recovery belongs to the problems solved by legislative policy level, which is out of the

[244] Workplace Injury Determination Regulation, Article 5 indicates that the worker is obliged to submit the evidence to prove the relationship between him and employment before workers' compensation recovery procedure begins.

control of courts."[245] Notwithstanding the justifications for double recovery, with considerations of various realistic problems in current China, double compensation should not be allowed in practice.

The first realistic factor needs to be considered into legislative policy making is the economy. Since compensation for workplace injury and occupational disease is dealt mainly under the framework of social security system, the collective perspective is necessary in balancing the actual compensation received by victims. At the current stage of economic development of China, extremely high efficiency of allocating the limited economic resources to the domains which need most is a tough mission. With regard to the domain of workplace injury, the repeated[246] compensation from the social security system and the tort liability system actually is sort of a waste of economic resources. Take the actual compensation of offered both systems in Beijing for example, in a death case arising from work in 2007, the death benefits from social insurance program received by dependants of the deceased includes: a) funeral benefit, b) death allowance (lump sum), and c) survivor benefit. If a tort contributes to the death, the dependants of the deceased can recover through tort liability system: a) death benefit; b) death allowance; c) survivor benefit and d) non-pecuniary compensation. According to the average earning standard of Beijing in 2006,[247] the benefits for death provided by workers' compensation social insurance program amount to RMB 162,432 (excluding survivor benefit), while the compensation recovered by dependants from tort system is RMB 417,608 (survivor benefit and non-pecuniary payment excluded), which surpasses the social insurance benefit for approximately RMB 250,000.[248] It is possible to estimate that the large compensation gap between

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[245] See Wang Zejian, 劳灾补偿与侵权行为损害赔偿, Workplace Injury Compensation and Tort Compensation, Civil Law and Case Study, Vol. 3, p299.

[246] The "repeated" here means the merely same name of benefits or indemnities of both social security insurance and tort compensation; however, it does not refutes the entitlement to get such benefit or indemnity from each remedy supported by each compensation foundation.

[247] Average earning of year in Beijing 2006 is RMB 36,097.

[248] The actual compensation gap will be far bigger if the spiritual loss is calculated into the tort

the two compensation systems for workplace injury or death is capable of saving another worker's life or another family of the deceased although both bills might be the compensation that the victim deserves. On this occasion, double recovery means to allocate a large proportion of economic resources to an individual victim leaving many of other injured workers unsaved due to a large financial gap. Therefore, the current workers' compensation system of China might not be able to afford such prices.

Furthermore, a second important factor that the legislative policy maker has to concern is the social fairness or social justice. Letting some victims getting relatively over-compensated (if double recovery is allowed), and others uncompensated or under-compensated (under the condition of pure accident at workplace) will not meet the social justice, especially at the current stage when disparity has developed into an extraordinarily serious social problem of China. Therefore, double compensation, to some extent, currently will decrease the social compact of China which appears to be one of the most important social purposes at the time when workers' compensation system was envisaged.

Apart from that, the standards of international conventions should also be taken into account of designing the structure of workers' compensation system of China. Although there is still not any generalized provision in the international conventions about whether the double compensation is allowed in the domain of employment injury or occupational disease, the special provisions in respect of certain type of workplace injury reflects the attitudes towards double recovery of international organizations. For example, Clause 2 of Article 7 in 1964 Employment Injury and Occupational Disease Benefit Convention: "where commuting accidents are covered by social security schemes other than employment injury schemes, and these schemes provide in respect of commuting accidents benefits which, when taken together, are at least equivalent to those

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compensation.

required under this Convention, it shall not be necessary to make provision for commuting accidents in the definition of 'industrial accident'". The provision passed by International Labor Organization has implicitly denied the possibility of receiving double compensation from both private and public compensation systems of work-related injury caused by commuting accidents. And this perspective or attitude towards double recovery should also be adopted by China in the background of globalization in which labor standards need to be uniformed and globalized to improve further developments of labor market.

As has been argued above, it is possible to conclude that considering the influential factors above when it comes to making decisions on certain policies, double compensation from both systems for workplace injury and illness might be inappropriate in current China. With the evolution of compensation for industrial injury and occupational disease, a more sophisticated structure of workers' compensation system is also needed to gain a balanced situation between public solidarity and private responsibility.

In this chapter, three fundamental questions concerning the basic scenario of workers' compensation system in China have been proposed and justified by supporting practical details in dealing with the relationship between tort liability litigation and social insurance program. Combining the reality of China and some noble aspirations resulted after thirty-year evolution of workers' compensation systems in western countries from 1970s, it is appropriate for China currently to take the social insurance program for work-related injuries and occupational diseases into the workers' compensation mechanism, accompanied by civil liability as a complementary compensation channel which appears to be the Supplementing Model. Through answering the three questions which are linked with each other logically, this chapter has illustrated a clear framework of the relationship of two compensation systems within the broader

of workers' compensation system of China.

Until now, the basic arrangement has been set up; however, there are many variants of workers' compensation cases with varying causations of tort liability and various types of workplace injuries, so a generalization of the entire workers' compensation system is impossible. The more efficient reform considerations about workers' compensation system of China need to be provided in details which will be given specifically according to different categorization of workplace injury types as different causal relations.

CHAPTER 6 FURTHER REFORM CONSIDERATIONS FOR WORKERS' COMPENSATION SYSTEM IN CHINA

In this chapter, the author will attempt to provide further suggestions in respect of the specific arrangement of tort liability and social insurance, depending on the different categories of industrial injuries in China. The current compensation practice for each type of industrial injury will be introduced first, based on which concrete suggestions on what should be changed and the reasons underlying the suggested changes will then be discussed. Correspondingly, some of the typical cases in Chapter 3 which were used to illustrate the fundamental problems of Chinese workers' compensation system that have been seriously questioned will find their answers in this Chapter.

In Chinese practice of workers' compensation, workplace injuries are divided into three categories according to the criteria of causal relations: industrial injuries caused by accidents owing to no one's fault (or the victim's own fault); workplace injuries involving the fault or negligence of the employer; work-related damages deriving from the third party (e.g. motor vehicle accidents relating to work).

With regard to the workplace injuries caused by accidents owing to nobody's fault, which can be considered one of the initial aims to envisage no-fault workers' compensation program to protect the victims damaged by the "hands of the god", the workers' compensation social insurance program is the only guarantee for them. For these victims on the job, no one needs to take the

responsibility in tort system for their damages due to the lack of causation. Hence, the injured workers have to face the physical pain brought by the industrial accidents on their own. Despite of the lack of compensation basis in tort liability system, the sole-remedy compensation model-only workers' compensation social insurance available- is well-suited to reduce the number of increasing civil litigations. For the work-related injury deriving from industrial accidents owing to nobody's fault, therefore, reasonable comments can be given to the adoption of the Relieving Model since no basis could be found in tort liability system. In Chinese practice of workers' compensation of this type of work-related injuries, such model has never or seldom been seriously questioned since its establishment in China.

Apart from the industrial injuries caused by accidents, other two types of work-related injuries involving both employers and the third party (such as motor vehicle drivers usually) are connected to the role of tort liability in the compensation. There have been many discussions on these two types of compensation and various views for reform have been voiced. Thus, they deserve serious attention. For these two types of work-related injuries, the compensation practice in China varies from place to place. This chapter will mainly address these two types of compensation.

I. REFORM SUGGESTIONS FOR WORK-RELATED INJURY CAUSED BY EMPLOYER

The work-related injury caused by employer means that the employers have contributed to the occurrence of injuries on the work on purpose or through negligence. For example, the injuries directly committed by employers at fault, or the damages derived from the over risky activities under the instigation of

employers, or the deterioration of damages owing to delay of medical care caused by the interruption of employers are typical of such cases.

A. Current Compensation in Chinese Practice

With respect to work-related injuries involving employer negligence or fault, as mentioned in Chapter 3, current workers' compensation system of China has excluded the possibility of tort liability remedy in practice. Based on the prevailing understanding of Article 12 of the Interpretation of the Supreme People's Court on Some Issues concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury (Judicial Interpretation [2003]20) [249], in spite of some disagreeable voices from academia and even inside of the people's courts, injured workers are barred from suing their employers for the claim that their damages are caused by employers from the beginning to the end.

There are two main factors contributing to such a model of workers' compensation system structure, when we explore the logic underlying the way of dealing with the relationship between social insurance and tort liability for work-connected injuries involving employers. They are historical legal institutions and cultural reflections of China.

At the beginning stage of Chinese legislative activities in the middle of the twentieth century, a large number of legal structures and concrete provisions from legislation of Germany were brought to China, in particular to the domain of labor law and workers' compensation law.[250] This has led to the fact that all the forms of disputes of workplace injury cases involving employers are classified as belonging to the domain of labor disputes (according to Article 2 of

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[249] Clause One of Article 12 regulates that:"Where a worker of an employer who has required by law the responsibility to contribute to the workers' compensation social insurance program, suffers from a personal injury due to a work-related injury accident, and the worker or his close relatives brings a lawsuit to the people's court claiming against the employer for bearing civil compensation liabilities, he shall be informed to handle the matter in accordance with the 'Regulation on Workers' Compensation Insurance'".

[250] Zheng Shangyuan, Gong shang pei chang fa lv zhi du yan jiu, Research on Workers' Compensation Legal Institution, Peking University Press 2004, p53.

PRC Enterprise Labor Dispute Ordinance and Article 55 of 1996 PRC PPWCIEE[251]). Based on the special characteristics of labor relations such as asymmetrical power relation between the employer and the employee, Chinese legal institutions have divided labor disputes including workers' compensation into a unique domain in law both from legislation and from legal practice perspectives. For a long period of time since the first introduction of workers' compensation law of China, with regard to solving the compensations for workplace injuries, only the substantial laws and procedural laws in labor law domain were referred to. There was a considerably clear line between labor disputes and tort liability cases in civil law system. Further, the compensation model adopted for workplace injuries involving employers was similar to that of Germany, which excluded the participation of tort system.[252]

The second factor underlying the model adoption for this type of workplace injury can be traced to the legal culture of China. The traditional attitude towards litigation was extremely negative, which was famous as the words "litigation-free" or "litigation appeasement" indicate. Moreover, the unequal bargaining power between the victims and their employers usually has made the injured employees choose a passive way to solve the problem, instead of suing their employers which might lead to the unharmonious environment at the workplace. This idea also complies with the principle of Golden Mean promoted by the rulers of all dynasties in China, that is, one should be moderate at all times. Multiple cultural elements finally explain the way to deal with the relationship between public social insurance and private litigation in compensation for workplace injuries involving employers in current China.

Owing to the factors above, in Chinese practice o, victims on the job whose

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[251] 1996 PRC Provisional Provisions on Workers' Compensation Insurance for Enterprise Employees.

[252] See "Original Establishment of Workers' Compensation Insurance Programs: Germany Model and England Model" of Chapter 2 and "Fleming's Model Theory" of Chapter 4. Germany is the leading country which first obsoletes tort liability remedy from the compensation system of work-related injury, thus adopts the Relieving Model.

bodily damages are caused by employers can only get compensation benefits from social insurance system, and cannot obtain full compensation through tort liability litigation. The people's courts of China usually reject the tort claims from those injured workers against their employers.

As we have seen in Chapter 3, such compensation model or arrangement for the type of work-related injury has given rise to a number of serious problems in China. Both victims and the whole workers' compensation system have to pay the bill for negligent or intentional employers, since they cannot benefit from such compensation model and the only winner is the employer. Some argue that the employers should be immune from compensation because of their financial contribution to the social insurance funding; some believe most of the victims will not choose to file tort claims against their employers even if they were entitled to. These arguments underpinning the immunity of employers, in fact, do not hold water if they are examined specifically.

The original idea with which workers' compensation insurance programs were envisaged was to protect and secure the injured workers whose damages were due to pure accidents not caused by employers' fault or negligence. It is necessary for employers to contribute to workers' compensation programs because they are the largest beneficiaries of the programs, as they frequently involve their workers in highly risky activities which present high possibility to get damaged. What's more important is, although many victims will choose the friendly working environment instead of challenging the labor relations between their employers and them, this should not be considered as the justification for depriving some brave workers of their entitlements to pursue full compensation. Rights of few people should also be justified as rights, and their rights should not be barred only because most people might give up them owing to their personal considerations.

B. Reform Suggestions

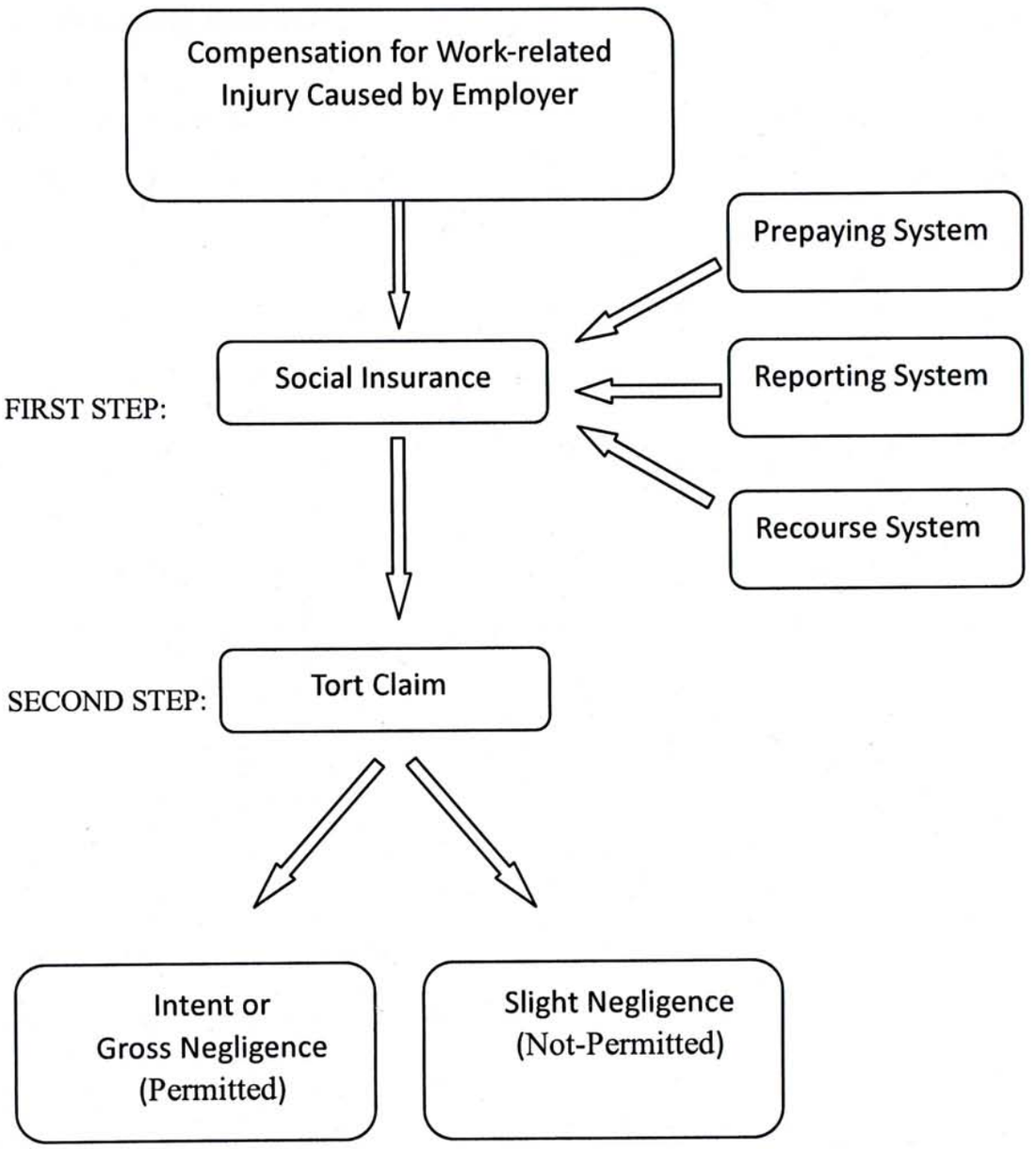

Chart 6-1 Compensation for Work-related Injury Caused by Employer

As Chart 6-1 shows above, to improve the compensation structure of social insurance program and tort liability litigation for the workplace injuries involving employers, this section will explain the concrete reform suggestions specifically in two steps. Corresponding operational systems will support each of the steps. .

a. First Step: Social Insurance Benefit

i. Prepaying System

First, the quick social insurance remedy is highly recommended once the type of injuries occurs. This arrangement should not be limited within this generalized consideration since it is the same in current practice, but should be more specific. The author suggests that the priority of social insurance benefit should also be reflected in the "Prepaying System". The Prepaying System means that public insurance awards should be paid firstly to the injured workers under all the occasions covered (or statutorily covered) by workers' compensation social insurance program, including the injured workers who should be covered by social insurance program and have attended, the injured workers who should be covered by public social insurance but have not attended, especially for the victims whom employers refuse to pay the expenses of medical care. The prepayment of social insurance benefits for all the workers who should be covered by the program will be a huge guarantee for victims to get timely medical cure, and relieve their pressure from a large extent of raising money. For the victim who has lived a difficult life, this award might save the lives of his (her) family by providing him (her) the possibility to rehabilitate to work in the future. Further, the prepayment of social insurance benefits is a way of winning fair protection for injured workers who should be covered by public social insurance but have not attended.

Actually, some recent statutes which aim to improve the social insurance system in China realize such reform consideration. For example, in the PRC Social Insurance Law (Draft) which was made public for suggestions in December 2008, some signs can be found in Article 37 which states that "it does not affect the entitlement of injured workers to get social insurance benefits, if the employers did not contribute to insurance funding for the workers legally;

when the workplace injury occurs, the expenses of medical cure should be paid by the employers; if the employers refuse to pay, such expenses can be prepaid by social insurance funding, which should be returned by the employers afterwards;"

ii. Reporting System & Recourse System

In spite of the good sign of reform in such draft, there are still many concrete places which need clarification or discussion, especially regarding the operational details of the Prepaying System for workplace injuries involving employers. For example, how to make sure that the damages on the job comply with the preconditions of statutory workplace injuries? Who should take the responsibility for providing evidence? is the "notice of workplace injury determination" necessary for the prepayment of social insurance and how could the social insurance administration retrieve the prepaid benefits from those employers who have not contribute to the social insurance funding? All these questions above show that there must be some complementary ideas or considerations to help enforcing the prepayment effectively.

In such cases, the author suggests the "Reporting System" and "Recourse System" to be the auxiliary ideas. The "Reporting System" means that the employers or injured workers or their dependents are responsible for reporting to the local social insurance administration within 24 hours from the occurrence of work-related injuries. Upon receiving the report of work-related injuries, the officials of labor administration (usually the Labor Surveillance Force) should come to the work site to conduct investigation within the next 24 hours if there is the need. It should be noted that for minimizing the administrative costs, the investigation should be taken by the Labor Surveillance Force located nearest to the work site, and only limited to those which cannot be judged clearly from the report whether it can be considered as workplace injury. For the injured workers who have not attended but should be covered by the workers' compensation

social insurance program, social insurance administration should prepay the benefits to ensure that they receive urgent medical cure if their employers refuse to pay such expenses within 3 or 5 days after the damages on the job happen.

To maintain the sustainability of the prepayment of social insurance benefits, the "Recourse" right of social insurance administration from employers is of great significance. In reality, many employers evade paying expenses by transferring their assets or even declaring bankruptcy falsely. Hence, to empower social insurance administration to punish these employers to some extent can effectively avoid the loss of social insurance funding, thereby ensuring the sustainability of the prepayment institution in the long run. For example, the social insurance administration can be authorized to impose a fine amounting from 2 to 5 times of the prepaid benefits. Alternatively, the administration can retrieve the social insurance benefits amounting from 200% to 300% of prepaid benefits. Moreover, it must be noted that all the money in excess of the prepaid awards should reflow into the social insurance funding. Such "Recourse" right not only can ensure the sustainable enforcement of the Prepaying System, but also can increase the preventive incentives to avoid the irresponsible employers escaping from contribution as well as refusing to pay medical cure expenses for their injured workers. Meanwhile, a quick and influent channel which requires compulsory enforcement administratively for social insurance administration to recourse the prepaid benefits from irresponsible employers needs to be built up to ensure the healthy circulation of public insurance funding.

The prepayment of social insurance benefits reflects the priority of social security system in the compensation for workplace injuries involving employers, but also improves the workers' compensation system of China by way of considering more about the victims both on the job and on the attendance of social insurance program. With regard to this consideration of reform, a number of supportive institutions such as "Reporting System" and "Recourse" rights are conceived indispensable to the further enforcement in China.

b. Second Step: Tort Liability Litigation

The second step in the compensation system of workplace injuries caused by employers is quite complicated and deserves more attention as well. After the first step, the urgent needs of medical cure, care of living and dependents' living have been met by social insurance workers' compensation program. There have been some considerations of further needs of some victims such as to rehabilitate back to work as well as to receive full compensation, particularly the non-pecuniary compensation for their spiritual losses caused by negligent or intent employers. As discussed earlier, the entitlement of filing tort litigations against the employers should not be deprived of in workers' compensation system of China. The public insurance benefits received by the victims at the first stage relieve their pressure suffered from the injuries, and give them the staying power even an incentive to bring a tort action, especially where their recoveries have the potential to exceed the amount of their workers' compensation insurance benefits by a significant margin. However, considering multiple factors, the second step which involves the participation of tort liability system needs to be discussed according to different situations.

In reality, it is highly recommended that those workers suffered from work-related injuries caused by slight fault of negligent employers ought not sue their employers, while those whose injuries on the job are deriving from gross negligence or intent of their employers are to be allowed to file tort claims. Some major considerations need to be taken based on such distinction when suggestions are provided. Firstly, to avoid soaring number of labor disputes which has already become one of the pressures of current Chinese judicial system. The heavy burden of a great number of labor disputes in local people's courts has already resulted in the serious delay currently. In 2008, the number of labor dispute cases dealt with by the people's courts of all levels has amounted

to 286,000, which is almost 2 times of the number in 2007.[253] In the first half of 2009, the number has already amounted up to 170,000, climbing in a few local areas in particular, such as Guangdong, Jiangsu and Zhejiang Provinces, the numbers of the first quarter of 2009 have exceeded separately about 41.6%, 50.3% and 159.6% of the number in the same period of last year. Accompanied by the increasing number of labor dispute cases, delay or holding back problems begin to prevail among local people's courts. Even under a number of circumstances, lawyers usually receive the "Notice of Delay Trial" from the courts at the time when the cases are accepted. Besides, the overwhelming handling of cases which have been tried means a huge number of administrative costs and it will increase the burden of allocating limited economic resources. Since the difficulties above have been faced by the civil litigation system of China, it would not be a good choice for workplace injuries caused by slight negligence of employers to get access to tort liability system.

Apart from the above considerations in reality, it can be conceived that it would be much easier for victims suffered from gross negligence or intent of their employers to succeed the tort litigations than do the victims of slight negligence workplace injuries. Firstly, less energy will be taken for victims of gross negligence or intent torts to find evidence to prove the tort behavior of defendants than "slight negligence victims". According to Article 48 of The PRC Production Safety Law as well as Article 52 of The PRC Occupational Disease Prevention Law,[254] the tort litigation will be supported by people's courts when the statutory occasions occur which usually result from the gross negligence or intent of the employers. These provisions of special laws will save a great deal of energy for the injured workers in work-related damage cases involving gross negligence or intent of employers. Secondly, since workers' compensation social insurance program does not provide the payment for pain and suffering, in effect

[253] Wang Shengjun, 2008 Work Report of Supreme People's Court, Chinese Government Website, p2.
[254] Both of the provisions of two special laws have been discussed in details in Chapter 3.

injured worker's tort action against their employer is an attempt to acquire a substantial amount of payment for his real damages including non-economical losses. It would be highly possible for people's courts to support the claims for non-pecuniary compensation of the victims of "gross negligent or intent workplace injuries". In 2001, the Interpretation of the Supreme People's Court on Problems regarding the Determination of Compensation Liability for Spiritual Damages in Civil Torts (Legal Interpretation [2001] 7) was promulgated, Article 10 of which provides that "when determining the amount of spiritual damages, the following are to be taken into account: a) seriousness of the infringer's wrongdoing, except otherwise provided by law; b) specific circumstances regarding means, occasion and manner of the infringement; c) consequences of the infringement; d) circumstances regarding earnings gained through the infringement; e) economic capability of the infringer for bearing liabilities; f) the average standard of living in the area where the court trying the case is located." [255] Undoubtedly, judging from the criteria above, the gross negligence or intent infringement will become an extremely important criterion for courts to consider whether to support the tort claims of plaintiffs. On the contrary, it is not likely for injured workers who suffer injuries on the job caused by slightly negligent employers to win the tort claims in accordance with the statutory provisions of both determination of tort and support of spiritual losses. As the realistic considerations and legislative analysis in China above, therefore, the tort liability system should only open to the victims caused by intent or grossly negligent employers, while in the case of work-related injury involving employer's slight negligent, the block of tort remedy is quite reasonable.

One may wonder about how to determine a workplace injury is caused by slight negligence or gross negligence of employers. The answer to this significant question might be found in the "Reporting System" proposed in the

[255] Article 10 of The Interpretation of the Supreme People's Court on Problems regarding the Determination of Compensation Liability for Spiritual Damages in Civil Torts.

first step. It needs the cooperation of injured workers and labor administration to investigate through the work-related injuries for the final decision to come up within 48 hours from the occurrence of workplace injuries. Furthermore, according to the fifth chapter of The PRC Production Safety Law as well as The Accident Report and Treatment Rule of Enterprise Worker's Work-related Injury and Death issued by the State Council of the PRC, the related administrative department for workplace safety is responsible for issuing an investigation report which would be an effective proof for injured workers to claim for compensation through tort liability system.

The concrete suggestions given above about the specific design of compensation system for workplace injuries involving employers not only is able to guarantee the basic compensation level for all the workers who should be covered by public workers' compensation insurance, but could also provide more incentives to make employers prevent work-related injuries by taking positive measures to keep their workers safe and comfortable at work. Moreover, the reform considerations allow brave workers to pursue compensation for their actual losses from irresponsible employers through tort liability system which help to relieve the social fairness or social disparity problem of China.

C. Verification Through Case Study

To illustrate the reform considerations, the cases discussed in Chapter 3 need to be provided with appropriate solutions and to be justified by the suggested scenario of workers' compensation system above.

With regard to Case 3-5,[256] according to the proposed "Reporting System", the labor administration should conduct an investigation of Wang's accident on the job. With the cooperation of Wang's husband, her workmates and employer,

[256] See Chapter 3 the details of Case 3-5.

a detailed investigation report is supposed to be given out in which the causation of the work-connected injury has been estimated. If Wang's employer refused to pay the expenses during the period of medical cure, the social insurance administration could prepay social insurance benefits to Wang in accordance with the "Prepaying System" to guarantee the medical care and basic living needs of the victim. With the "Recourse Right", the labor administration is entitled to retrieve the prepaid social insurance benefit from the negligent employer. In addition, judging from the case, Wang's injuries were directly related to her employer's gross negligence because the reason for her serious bodily damage was that she was designated to an old machine lack of repair. Her employer's failure of providing safe working equipment has already belonged to the gross negligence. Hence, apart from the social insurance awards, it is very likely for Wang to receive tort compensation through suing her employer as well.

In the cases which are similar to Case 3-5, the victims like Wang do not need to risk all their bids on the tort liability litigation system while abandoning social insurance benefits, or choose secure public awards instead of attractive amount of compensation from tort system. According to the suggested workers' compensation system for work-related injury caused by employer, the victims could benefit to the largest extent. The secure social insurance benefits provide injured workers some staying power in the tort liability system and even an entrance to pursue full compensation from the real wrongdoers. Apart from that, it will increase the incentives to deter the irresponsible employers from overlooking safety environment of workplace.

Similarly in Case 3-6[257], under the timely report from Liu's workmates or his dependents and the investigation of social insurance officials, Liu could receive the prepaid social insurance benefits. Meanwhile, he is also allowed to file a tort claim against his employer for holding up medical cure thereby

[257] For details of Case 3-6, see Chapter 3 case study.

deteriorating the situation of his work-related injury.

What's more important, given the proposed reform suggestions, thousands of injured workers no longer need to be forced to compromise for little compensation through private reconciliation with their irresponsible employers because the scenario above has empowered the injured workforce by strengthening the participation of labor administration into the workers' compensation. It reduces the room for irresponsible employers to take advantage of the asymmetrical bargaining power in the industrial relations through interrupting the workers' compensation procedure. The suggested workers' compensation system for work-related injury caused by employers has changed the relationship between injured workers and their employers by active intervention of labor administration as below (Chart 6-2). With the participation of administrative power, the unequal relationship between employers and injured workers has been changed into an equal and more effective one.

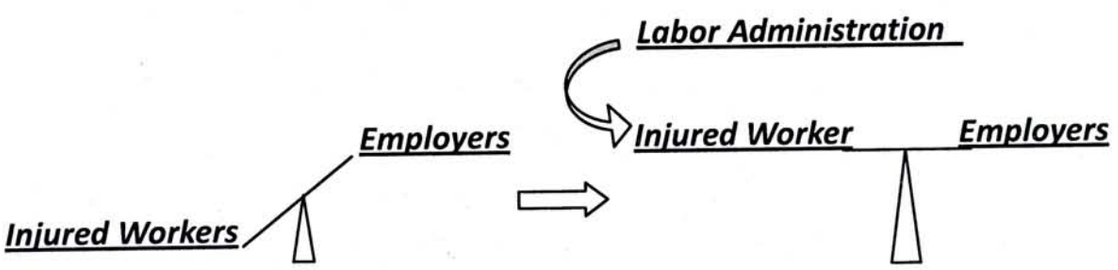

Chart 6-2 Relationship between Injured Worker and Employer

II. REFORM SUGGESTIONS FOR WORK-RELATED INJURY CAUSED BY THE THIRD PARTY

Another significant type of workplace injuries which involves the adjustment of social insurance program and tort remedy is the work-related injury caused by intent or negligent tort of the third party. It takes substantial percentage of all types of work-related injuries of China. This type of work-related injury usually means that the victims' bodily damages derive from the tort behaviors of the third party such as motor vehicle accidents (most frequent). In accordance with the prerequisites of work-related injury, the co-existence of causes of claims for public and private remedies, it gives rise to a conflict of compensation systems between tort liability and workers' compensation social insurance program.

A. Current Compensation in Chinese Practice

Work-related injury caused by the third party was the original idea to inspire scholars and legal practitioners in the domains of labor law and civil law to reconsider the problems of workers' compensation system of China in dealing with the relationship between private tort liability and public social insurance. However, this original problem has never been solved appropriately. As discussed in Chapter 3, with regard to this type of workplace injury, the PRC RWCI chooses to overlook in the form of the absence of related provision. Under this circumstance, most of local areas are forced to follow the model set by the 1996 PRC PPWCIEE. Different from the situation of workplace injuries caused by employers, the entitlement of victims to file tort litigations against the third party has been recognized by Article 12 of the Legal Interpretation [2003]20. On the contrary, it seems not enthusiastic for social insurance program to involve into compensating for this type of workplace injury. Although there

have been various ways of compensating work-related injuries deriving from third party's tort among different local regulations, the general or most adopted structure appears to be that tort liability system takes the first place supplemented with public social insurance benefits in current Chinese workers' compensation practice .

The motives of current compensation model for workplace injuries caused by the third party is to save the social insurance funding owing to its limited amount with comparison of the huge number of uncompensated victims on the job in China. As was shown in Chapter 3, the continuingly increasing number of industrial accidents has taken a considerable portion of public insurance funding every year. For allocating the public insurance benefits most effectively, social insurance has been arranged in the supplementary place to the principal position of tort liability system in the compensation system for work-related injuries brought by third party. Apart from that, minimizing the administrative costs might be another concern as well. Further, many people believe that social insurance funding is not supposed to pay the bill for the real tortfeasor who directly cause the damages of workers. Nevertheless, they seem to have forgotten the most essential of these workers' damages which are the injuries related to work.

Notably, among the various workplace injuries of this type, injuries involving motor vehicle accidents most frequently occur and thus drawing the most attention. For a long period of time, the compensation structure for this type of workplace injuries in dealing with the relationship between tort remedy and social insurance program has been following the old model. However, the change has begun to happen from Beijing where the social insurance remedy has been excluded from the compensation system for the victims who suffer from work-related injuries caused by motor vehicle accidents. Then followed by the legislation at the national level in the Decision on Modification of Regulation of Workers' Compensation Insurance (draft version to collect suggestions) issued

by the PRC State Council in July 2009. One of the notable changes is to remove the injuries caused by motor vehicle accidents on the way from or to work from the general definition of work-related injury, thereby excluding it from the workers' compensation social insurance program. The change means that the social insurance program aims to "solve" the tough problem by entirely throwing the problem to civil tort system. Such way of compensation will only get the situations of victims worse, because the problem will by no way be solved appropriately without the participation of social security system in China.

Some points have been held by the officials who appraise for the exclusion of injuries caused by motor vehicle accidents on the job. An important argument is the existence of compulsory motor vehicle insurance linking with motor vehicle accidents according to the recently promulgated laws in China. In fact, however, it can be observed that the highest amount of compensation paid by current motor vehicle insurance is only RMB 122,000 through specific calculation of which highest payment of medical expenses is only RMB 10,000,[258] which is far from enough to compensate the actual damages of the victims who suffer from serious injuries, let alone the deceased workers. Besides, there is still a relatively high possibility that the victims fail to receive the motor vehicle insurance compensation since the requirements of insurers are considerably harsh. And the exclusion of social insurance will leave those victims no compensation which increases the unstable factor and even shakes the social compact of Chinese society in the long run. Another argument of supporting the change appears to be in the official draft explanation that "from the purposes to envisage social insurance system for workplace injuries, workplace injuries should be strictly defined as injuries happening during working time, at working site and for working reason; although the way to and from work can be considered as the extension of working time and working site,

[258] Beijing Legal Aid and Research Centre, Internal Report about Workers' Compensation in China, 2009,p25.

it does not meet the strict definitions".[259] Undoubtedly, this interpretation or explanation shows the extremely inflexible understanding of the term "workplace injury". And this argument mainly derives from the narrow interpretation of Article 7 of the Convention Concerning Benefits in the Case of Employment Injury issued by International Labor Organization in 1964[260] without taking into consideration the real situations in current China where a prevailed social security system has not been built up to cover all citizens including the victims of commuting accidents. Therefore, the exclusion of workplace injuries by the draft involving commuting accidents from the protection of social insurance program actually reflects the short insight and especially the "ostrich psychology" of authorized government and administration. After all, the problem has to be faced of dealing with tort liability system and social insurance program in respect of compensating work-related injuries caused by third party, even outside the field of injuries caused by motor vehicle accidents.

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[259] The Decision to Modification of the Regulation of Workers' Compensation Insurance (draft version to collect suggestions), issued by PRC State Council in July 24, 2009 at www.xinhuanet.com, p1.

[260] Clause 2 of Article of 7:"Where commuting accidents are covered by social security schemes other than employment injury schemes, and these schemes provide in respect of commuting accidents benefits which, when taken together, are at least equivalent to those required under this Convention, it shall not be necessary to make provision for commuting accidents in the definition of "industrial accident"", the Convention concerning Benefits in the Case of Employment Injury issued by International Labor Organization in 1964.

B. Reform Suggestions

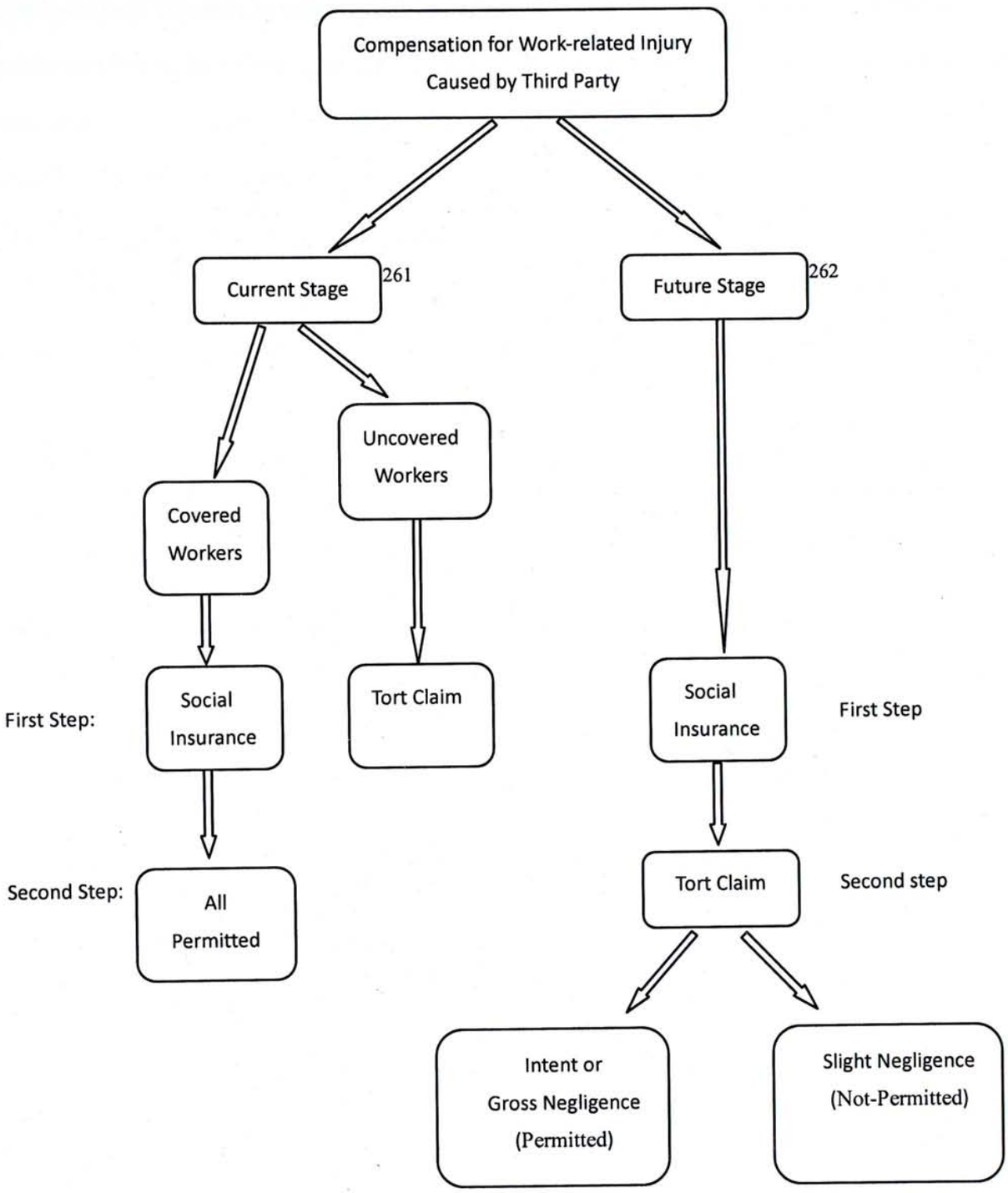

Chart 6-3 Compensation for Work-related Injury Caused by Third Party

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[261] The Current Stage means that the workers' compensation social insurance program is still independent from social security system in China, and only a part of workers is covered.

[262] The Future Stage is when social insurance program for worker' compensation integrates into the social security system, and all citizens are covered by the system.

Notwithstanding the practices of current compensation structure of work-related injuries involving third party analyzed above, a number of serious problems have been brought up owing to different standards of compensation and interpretations of old laws among local areas of China. As discussed in the earlier chapter, the unfair protection of injured workers subjected to similar degree of damages is supposed to be the problem urgent to be solved. What's most important, the key word "unification" of a reasonable compensation structure seems to be of the greatest significance to the way of compensating such type of work-place injuries, thus also meeting the need of governing the social insurance funding properly of China as well.

As showed in the Chart 6-3, the unified reform considerations for compensation system will be recommended in details of work-related injuries caused by third party (including commuting accidents related to work) as below:

a. First Step: Social Insurance Benefit

For injured workers who should be covered by workers' compensation social insurance program, the author suggests that they should recover from social security benefits before resorting to tort litigation. Similar to the first step in respect of compensation structure for work-related injuries involving employers, the supportive operations of "Reporting System", "Recourse System" and the Prepaying System also apply to the social insurance remedy for the workers who suffer from the work-related injuries caused by third party.

The earlier chapters have given various reasons for the priority of social insurance benefits; it will specifically analyze here a few significant ones for work-related injuries derived from third party in particular. Firstly, the essential feature of such type of industrial injury leads to the dominance of social security in the compensation system. Despite the reasons of the injuries which might appear to be caused by either accidents or negligent employers or even third party, the essence of the work-related injury shows no difference. Notably, it

seems to be absurd that the compensation orders differ only in terms of the causation of work-related injuries. Since all the workers who supposed to be covered by workers' compensation social insurance program have contributed to the insurance funding in certain forms, they should be treated equally. However, according to the current practice of compensating procedure for work injuries caused by third party, some of the victims usually are not able to receive a penny from social insurance program because social security benefit exists as a supplementary remedy according to the old model adopted by most local areas in China; or because the little social insurance benefits unable to surpass the amount of tort liability compensation owing to the large gap between tort liability compensation standards and social security benefits statutorily.[263] It is not difficult to observe that the priority of tort liability in compensation structure of this type of work injury actually results in that some of injured workers can not get fair protection by social insurance system even if they are within the coverage. Therefore, to make each injured worker equal in front of the compensation system, social insurance benefits should take the lead before tort liability remedy Secondly, compared to social insurance program, tort system appears to be more costly and time consuming. And this also determines that the tort liability remedy is not the first choice.

i. Simplify Workers' Compensation Procedure

For ensuring the priority of social security system and securing the stability and timeliness of insurance benefits, some measures need to be taken for simplifying the procedure of social insurance system. In Article 32 of the PRC Social Insurance Law (Draft), "the workers who suffer from the accidents or the occupational illness derived from work are entitled to recover from social insurance awards for employment injuries through determination; the workers who have been determined as disabled through authentication should recover

[263] See the comparison of compensation standards in respect of tort liability system and social security system in details in the first section of this chapter, Table 5-2.

from the benefits provided for disabled people; the procedure of determining employment injuries, occupational diseases and disabilities should be as simple and quick as possible." The provision has reflected to some extent the legislators' awareness of the significance of simplifying social insurance procedure. Nevertheless, the general words have nothing to do with the actual improvement of the social insurance system in reality. Specific reform suggestions with regard to improving the efficiency of social insurance system for compensating workplace injuries weigh more than the general provisions.

ii. Reinforcing Labor Surveillance Force

Through reinforcing the administrative power of labor surveillance force, the procedure of determining the workplace injuries will undergo more fluently. This improvement can reflect in the investigation process as well as the punishment process. Since the lack of employment contract prevails in current Chinese labor market, the power of investigation and collection of evidence are of great importance to the determination of labor relations between the injured workers and their employers. Furthermore, if the employers refuse to cooperate with officials of local labor administration to investigate and to confirm the occurrence of workplace injuries, the labor surveillance force is entitled to impose certain amount of cash penalty. Therefore, the combination of the "Reporting System", "Recourse System" and the "Prepaying System", together with the consolidation of labor surveillance force, the social insurance program will operate effectively and sustainably in compensating the injured workers who suffer from work-related injuries caused by third party.

iii. Relieving Victim's Burden of Proof

Apart from the entitlements of labor administration, strengthening corresponding rights of victims can ease the complexity of social insurance procedure too. In compensation practice, the burden of proof on the shoulders of

the injured workers has been considered as one of the most harsh procedures in the application process of social insurance awards because most of the evidence is kept by the employers and they would never give to the labor administration if they are facing the huge pressure of compensating victims.[264] Under such circumstance, it is highly recommended by the author for the labor administration to refer to Article 75 of the Some Provisions of Supreme People's Court on Evidence of Civil Procedures (Legal Interpretation [2001]33): "Where there are evidences to prove that a party possesses the evidence but refuses to provide it without good reasons and if the other party claims that the evidence is unfavorable to the possessor of the evidence, it may be deduced that the claim stands." According to this article, when the employers refuse to provide the effective evidence (name list of workers, earning list, etc.) to prove the working relationship between victims and them before the injuries occur, the working relationship can be recognized by the labor administration. Given the application of Article 75 of Legal Interpretation [2001]33, the burden of proof of victims can be relieved to considerable extent. And injured workers' entitlements of getting social insurance awards thus will be guaranteed substantially.

With the cooperation of the improvement measures above, the victims who should be covered by social insurance program will recover from social security system effectively and without time delay

With regard to most of the workers who currently have not been covered statutorily by workers' compensation social insurance program, the only remedy for them might be the tort liability system since private insurance market of China has not developed well nowadays. And what the labor administration and employers can do at current stage is to help these victims to receive the tort compensation from tortfeasors with available measures as soon as possible.

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[264] In reality, the important evidence is mostly about the proof of labor relation between the injured worker and his employer, such as the registration record of work including the name of the injured worker, the worker's ID card at the work site, etc.

b. Second Step: Tort Litigation

The suggestions given to the arrangement of tort liability remedy in compensation system might be more sophisticated depending on the development of the workers' compensation social insurance program in China. When victims receive benefits from social insurance program, most of them will decide to file tort litigations against the third party. With the development of social insurance system, the compensation standard and coverage will improve substantially in the future of China. Therefore, the specific reform suggestions should be provided following the realistic trend as the changing of different situations.

i. Current Stage: Entire Permission to Tort System

At current stage when workers' compensation social insurance program only exists as an independent social insurance program and it only covers a certain percentage of workers in China, all the injured workers should be encouraged to pursue compensation from tort system, especially those workers uncovered by social insurance program even if third party only contribute slightly to their damages. The reason for the easy access to tort liability system at current stage attributes to the low standards of workers ' compensation social insurance program owing to current economic development in China. As compared in Chapter 5, even the social insurance standards of the large and more developed cities such as Beijing, Shanghai, Guangzhou are lower than the average levels set by the International Labor Organization (ILO), let alone the current standards of social insurance program of these poor regions of China. In addition, within the limited and fixed list of compensation types, the absence of nutrient fee, nursing care fee, rehabilitation care fee makes social insurance benefits incapable of compensating injured workers enough. Apart from the insufficient benefits, the costs spent on the complicated process of applying for the social insurance will never be returned to the victims. Moreover, there are

still a few places both in social insurance program and tort liability system which avoid the victims obtaining the real compensation making up to their actual losses. For instance, the maximum compensation time in both remedies for injured workers is only 20 years instead of the actual years left in their lives. Therefore, the insufficient part of social insurance benefits can be made up by the tort compensation to some extent even for the victims who get injured from the work-related accidents caused by third party's slight tort behavior.

ii. Future Stage: Partial Permission to Tort System

In the future stage when workers' compensation social insurance program has covered almost all the workers or in accordance with the coverage of PRC Labor Law, or when the social insurance program for workplace injury has been integrated into the broad social security system of China, the contribution of social insurance funding for workplace injury will concern almost each individual instead of the employers only. It can be considered that the risk and responsibility of work-related accidents have been distributed within the entire society. And each individual has the responsibility to contribute to as well as the entitlement to benefit from such social security system in China. In this case, the all-citizen-contribution has provided the logical foundation for the immunity of third party to some extent[265] because everyone might become the third party the next moment. And to some extent, this logical foundation is in accordance with that of the slightly negligent employer's immunity of tort liability provided in the reform suggestions for work-related injury caused by employer. Besides, for further minimizing administrative costs, the tort litigation entry only should be limited within the workplace injuries caused by gross negligence or intent of the third party.

At both stages above, the double recovery or duplicated compensation

[265] The extent to divide the availability to tort liability system should be the slight negligent of the third party.

should be avoided in every way in the compensation system for work-related injures. To allocate the social resources equally, duplicated types of compensation from social insurance and tort litigation need to be by no means allowed in workers' compensation system of China. And as the gradual improvement of the social insurance standards due to the considerably larger contribution to the funding, to avoid the double recovery will be supported by more people.

C. Verification through Case Study

Under the above reform arrangements of workers' compensation system for workplace injuries caused by third party, the cases mentioned in Chapter 3 will find their satisfied answers respectively. In Case 3.3-1, Liu can get the instant compensation from social insurance system for his workplace injuries firstly; with the benefits and the investigation report of labor administration, it will be very likely for him to receive the motor vehicle insurance benefits from the insurers of third party who caused his bodily damages. Wen of Case 3.3-2 will not need to waste too much time in proving the employment relationship between him and his employer due to the favored rules adopted in the application process of social insurance benefits suggested above. And with the timely benefits, Wen's pressure of returning to work immediately will be relieved to a large extent and he would be more patient to wait for the emergence of tortfeasor. Further, since the reform considerations will be integrated into the nationalized workers' compensation laws, the great distinction of compensation arrangements among different local areas will be avoided. All the victims will obtain comparatively equal protections from unified compensation system, and the only difference lying in the amounts of compensation that they receive will be the different computing standard owing to disparity in economic development among local areas of China.

What should be noted is that, according to the reform suggestions for both types of work-related injuries above, the workers' compensation system at the "future stage" of China in dealing with the relationship between social insurance and tort liability actually will be unified eventually. The reform considerations for workers' compensation system in dealing with the relationship between two remedies that have been envisaged today should become the unified goals to pursue tomorrow.

This thesis has taken a profound exploration of the relationship between the two compensation systems in the scope of work-connected injury and occupational disease in China with doctrinal, structural and empirical perspectives. Supported by the international survey of Model Theory during 30 years in a historical scope, the basic scenario in arranging two compensation systems for Chinese workers' compensation system has been proposed in Chapter 5, and equally come up with further reform considerations to support the framework proposed.

Chapter 2 has given an overview of the private tort liability and public social security in the framework of industrial injuries and occupational diseases when the shift of compensation systems began from the nineteenth century. The original considerations and motives of the no-fault workers' compensation scheme or system which have been explicitly put forward were to replace entirely the private tort law in the domain of workers' compensation. Employers' no-fault liability was the most radical departure from the tort liability system, and workers' compensation still was the most fundamental tort reform ever taken. However, the issues that workers' compensation confronted at the time of the enactment of special laws, and in many ways still confronts today, not only provide a general template for the analysis of virtually any significant contemporary tort reform proposals, but also doubt whether it is the most

feasible remedy to replace tort liability exclusively today.[266]

The motives of this thesis have been explicitly put forward in Chapter 3 during the discussion and analysis notably focusing on the workers' compensation system from the legislative phase to the realistic phase of China deriving from the compensation for industrial damage. In Chapter 3, after specifically analyzing two compensation remedies and the laws as well as regulations of China with regard to compensating work-related injuries, the perceived inadequacies of workers' compensation system in dealing with the relationship between tort liability and social security seem to influence the most fundamental problems lying in the workers' compensation system. A great amount of realistic problems related to the unfair protections have been discussed and illustrated by a few typical cases. Moreover, the low preventive incentive was another problem caused by the related deficiency. All the discussions have contributed to the endeavor of a concrete picture of Chinese workers' compensation system concerning the relationship between two compensation channels of workplace injuries and diseases.

In the process of exploring the way to solve problems of China, Chapter 4 has firstly reviewed the original Model Theory and updated its development over thirty years. The shifts between private tort liability system and public social security system also appeared to be hardly ever clear-cut in Western Europe, but on the contrary often gradual, incomplete or even inconsistent.[267] Whether the models adopted by the countries under review have been successful or not, is a question that cannot be addressed in general, since the answer mainly depends on the relative importance of the different situations of countries such as the policy goals pursued, economic situations and legal cultures. Still, when one

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[266] S. Klosse and T. Hartlief, Shifts in Compensating Work-Related Injuries and Diseases: Concluding Observations, Shifts in Compensating Work-Related Injuries and Diseases, Springer 2004, p221..

[267] S. Klosse and T. Hartlief, Shifts in Compensating Work-Related Injuries and Diseases: Concluding Observations, Shifts in Compensating Work-Related Injuries and Diseases, Springer 2004, p227.

takes the pursuance of peaceful industrial relations together with a secure and sufficient level of compensation as the fundamental goal in the history of compensating work-related injuries and occupational diseases, one could suggest the combination of tort liability and social security in a safe harbor.

Shifting the focus back to China again, in Chapter 5, following the experiences and major trend of workers' compensation systems in western countries, the author suggested the bold suggestion that some kind of basic model or structure seems to impose itself as the least contested or the most satisfactory in the sense that none of the interested parties has made urgent demands for increased benefits or other profound adjustments for China. This compensation system for workplace injury and disease demonstrates the following features:

a) A compulsory social insurance based on the risk related premium dominates;

b) Tort liability system as complementary remedy;

c) Statutory defined level of benefits avoiding duplication of compensation.

Having suggested the fundamental framework with regard to the relationship between tort liability and social security of workers' compensation system for China, the more specific reform considerations thus are needed since the generalization of each type of work-related injury is highly impossible.

Consequently, in Chapter 6, the structure based on the model choice requires sort of insight into the unique problems with respect to the compensation of work-related personal damage existing in China, and has been given through answering the questions or solving the problems lying in the typical cases in Chapter 3. With the understanding of the basic structure of compensation system in this regard, further effective considerations have been

tried to be conceived stemming from the framework given in Chapter 5 with respect to the concrete arrangements according to the categorizations of work-related damages in China.

The specific ideas towards the workers' compensation system targeting two major types of work-connected injuries caused by employers and third parties have been concluded against the practices in current compensation system of China. And the concrete suggestions support with justifiable reasons and effective details. With regard to the compensation system to workplace injuries caused by employers, the encouragement of tort litigation was proposed against the exclusion of tort system in current practice. Besides, the corresponding suggestions have given the explanation for the distinction of slight negligence and gross negligence of employers and its great importance in the pursuance of tort compensation. Furthermore, the first section of Chapter 6 has proposed some effective measures to guarantee the reform to enforce such as Prepaying System, Reporting System and Recourse System. Finally, the cases of 3-5 and 3-6 have proved the ideas above from empirical perspective.

As to the compensation system towards injuries deriving from work caused by third party, the further reform advice given by the author has reversed the sequence lying in current workers' compensation system of China. The second section of Chapter 6 has underpinned the suggestions with detailed reasons as well. The major considerations have been specifically given in two stages as the development of social security system in China with supporting reasons. Moreover, the cases of 3-1 and 3-2 have been solved or improved under the reform suggestions in this section.

It must be noted that the author's view towards the feasible scenario of workers' compensation system in adjusting tort liability system and social insurance program will never be perfect in each respect owing to the limitation of author's ability. Besides, the materials collected to support the author's arguments will

also be limited. However, the direction of efforts devoted to exploring a feasible relationship between tort liability system and social insurance system in compensating victims on the job in this thesis will be proved by other people's contributions to the improvement of workers' compensation system of China in the future.

DETAILED TALBE OF CONTENTS

CHAPTER 3 WORKERS' COMPENSATION SYSTEM IN CHINA: STRUCTURE AND PROBLEMS

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